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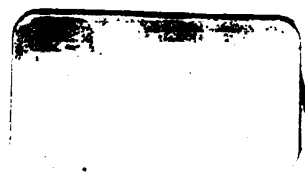
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THE 1893

ONTARIO REPORTS,

VOLUME XXVII.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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MEMORANDUM.

On the 17th June, 1896, the Queen was pleased to confer the honour of Knighthood on the **HONOURABLE WILLIAM RALPH MEREDITH**, Chief Justice of the Common Pleas.

ERRATA.

- Page 10, line 9 from top, for "rent" read "rest."
Page 79, line 11 from bottom, for "1892" read "1887."
Page 118, line 11 from top, for "6th" read "8th."
Page 167, line 16 from top, for "4th" read "14th."
Page 305, line 14 from top, after name of case add "30 C. P."
Page 335, line 3 from top, for "1895" read "1896."
Page 660, line 12 from top, for "ch. 4" read "ch. 40."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[COMMON PLEAS DIVISION.]

KING V. YORSTON ET AL.

Will—Construction—Election—General Words—"My Estate"—Insurance Policies—Apportionment—Variation—R. S. O. ch. 136, sec. 6 (1)—Deficiency of Assets—Legacies—Abatement.

Testatrix by her will left all her property, by general words, to her executors, upon trust, *inter alia*, (5) to set apart \$4,500 and pay the income to the plaintiff, one of her sons; (6) to realize on all the residue of the estate, and, after providing for maintenance of unsold portions, to pay \$1,400 to a second son and \$2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff, to divide the \$4,500 among his children, adding—"It is my will that my son Robert" (the plaintiff) "is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for \$2,000 on her life payable to the three sons, which was in force at the time of her death:—

Held, that the plaintiff was not put to an election between the benefits given to him by the will and his share of the \$2,000 policy:—

Held, also, that the will had not varied the apportionment of the \$2,000 policy, under the powers conferred by R. S. O. ch. 136, sec. 6 (1), and amendments, so as to exclude the plaintiff or put him to his election:—

Held, further, that in the event of the assets not being sufficient to admit of the setting apart of the \$4,500 and the payment of the two legacies of \$1,400 and \$2,000, the \$4,500 was first to be provided for without abatement, and the other two legacies were to come out of the residue and abate in the event of a deficiency.

THIS was an action by Robert King to obtain a construction of the will of Sarah Stubbs, deceased, dated 13th July, 1893.

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Statement.

The testatrix, amongst other property, left a policy of insurance on her own life for \$2,000, which, by its terms, was "to be disposed of as she might by her last will direct, or to herself, should she survive the tontine period;" and another policy on her own life for \$1,000, payable to her executors, administrators, or assigns. She also had effected an insurance on her own life for \$2,000 in the Federal Life Insurance Company, payable to the plaintiff, Robert King, and to the defendants W. J. King and Alexander King, which was in force at the time of her death. By her will she devised and bequeathed all her real and personal property, by general words, to her executors, upon trust, amongst other things, as follows:—

"5. To set apart out of my estate the sum of \$4,500, the income produced from the same to be paid to my son Robert King in equal monthly or weekly payments as my executors may see fit, the first payment to be made as soon as possible after my decease.

"6. To realize on all the residue of my said estate as soon as conveniently may be, and, after making careful provision for the proper maintenance of such part of my estate as may not then be sold, to pay to my son William John King \$1,400, and to my son Alexander King \$2,000, and when my executors and trustees have realized on all the residue of my said estate, they shall divide the same equally between my sons William John and Alexander King, share and share alike, and in event of the death of either the said William John or Alexander before distribution shall be complete, then the share which would have gone to deceased shall be part of his estate.

"7. After the death of my son Robert King, the portion of my estate which shall have been set apart as provided in the fifth clause hereof, and the proceeds of the house of which Robert shall at the time of his death have been in occupation, shall be divided equally amongst the children then living of my son Robert, as they respectively attain the age of thirty years, but the income may be paid quarterly. It is my will that my son Robert is to get no

benefit from my estate except as provided in this will, the Statement.
provision herein made being in lieu of any share in the
insurance on my life."

The testatrix died on 22nd April, 1894, and the will
was admitted to probate on 8th June, 1894.

The action was heard upon motion by the plaintiff for
judgment on the pleadings, before STREET, J., in Court, on
5th November, 1895.

Snow, for the plaintiff.

W. H. P. Clement, for the defendant *W. J. King*.

J. M. Clark, for the defendant *Alexander King*.

G. C. Campbell, for the defendants the executors.

The arguments of counsel are sufficiently referred to in
the judgment. Upon the question of election the following
authorities were referred to: *Story's Equity Jurisprudence*,
12th Am. ed., sec. 1086; *Theobald on Wills*, 4th ed., chapter
on "Election"; *Story's Equity Jurisprudence*, 13th Am. ed.,
secs. 1075-7; *Jarman on Wills*, 4th ed., pp. 443, 450, 469,
470; *Brown v. Parry*, 2 Dick. 685, *Romilly's Notes* 84;
Pickering v. Lord Stamford, 3 Ves. at p. 337.

November 15, 1895. STREET, J.:—

The first question raised was whether the plaintiff, Robert
King, under the circumstances, was put to an election
between the benefits given to him by the will and his share
of the policy for \$2,000 payable to himself and *W. J. King*
and *Alexander King*, by the concluding paragraph of the
7th clause of the will. The contention in favour of this
being a case of election necessarily assumes a belief on the
part of the testatrix that the policy in question was part
of her estate, and was included in the description "all my
real and personal property," and by the words "my estate"
and "my said estate," wherever they occur throughout the
will. I say that this contention necessarily assumes such
a belief because otherwise there is no disposition whatever
in the will of the proceeds of the policy, and without some

Judgment. disposition, in the will, of the property of the person
Street, J. against whom a case of election is sought to be raised, it is impossible that he can be put to his election.

The difficulty in the way of adopting this assumption here is that the testatrix has used only the most general words in describing that which she intends shall pass by her will, and it has been repeatedly laid down that mere general words are insufficient to raise a case of election against a legatee or devisee: *Gibson v. Gibson*, 1 Drew. 42; Story's Equity Jurisprudence, 13th Am. ed., secs. 1087, 1087a; Jarman on Wills, 5th ed., p. 425, ch. 14, sec. III.

It is argued that the words "the provision herein made being in lieu of any share in the insurance on my life," are sufficient to justify the conclusion that the particular policy in question was intended to pass. But here we find policies of insurance in force to which these words may be taken to apply. The moneys payable under one of these policies was to be disposed of as she might by her last will direct, and she may well be deemed to have had this policy in her mind when framing the clause relied upon in her will. In my opinion, the words here are not sufficiently clear to raise a case of election.

It was further argued that the fact that R. S. O. ch. 136, sec. 6 (1), as amended by 51 Vict. ch. 22, sec. 3, and by 53 Vict. ch. 39, sec. 6, gave power to the testatrix to alter the apportionment of the moneys payable under the policy in question, rendered it easier to raise a case of election against the plaintiff, or that, at all events, it should be held that the effect of the will was to apportion the whole insurance money between the two other beneficiaries, to the exclusion of the plaintiff. Here again, however, the argument is met by the difficulty that the testatrix professes to be dealing with *her estate*, and, therefore, presumably only with the policies which form part of her estate, and not with a policy which did not form part of her estate, and this difficulty appears to me to be insurmountable. I am of opinion, therefore, that the plaintiff is entitled to the benefits under the will and also to his one-

third share in the \$2,000 policy in the Federal Life Insurance Company.

Judgment.

Street, J.

The other question raised was as to whether, in the event of a deficiency of assets to pay the \$4,500 set apart by the 5th paragraph, and the two legacies of \$1,400 and \$2,000 in the 6th paragraph, the three legacies should abate proportionally. I think the construction of the will upon this point is quite clear, and that the \$4,500 is not to abate in event of such a deficiency, but is first to be provided for without any abatement, and that the other two legacies are to come out of the residue and are to abate in the event of a deficiency.

As to the costs, it was pointed out that to make them payable out of the estate would be equivalent to ordering the defendants W. J. King and Alexander King to pay them, as they are entitled to the residue. Under the circumstances, I think the proper order will be to make no order as to the plaintiff's costs, and to direct that those of the defendants be paid out of the estate.

E. B. R.

[QUEEN'S BENCH DIVISION.]

BURWELL V. THE LONDON FREE PRESS PRINTING
COMPANY.

*Defamation—Libel—Newspaper—Notice of Action—Sufficiency—R. S. O.
ch. 57, sec. 5.*

In an action brought against a newspaper company for alleged libellous articles published in the company's newspaper, the notice complaining of the publication given in pursuance of R. S. O. ch. 57, sec. 5, sub-sec. 2, was addressed to the editor of the paper, and was served on the city editor at the company's office, and a similar notice was served on the chairman of board of directors at the said office :—

Held, that this was a notice merely to the editor, and not to the defendants, and therefore was not sufficient under the statute.

Statement. THIS was an action brought to recover damages against the defendant, an incorporated company, for an alleged libel in the *London Free Press* newspaper.

A special case was stated in which the question raised was as to the sufficiency of the notice under R. S. O. ch. 57, sec. 5, sub-sec 2.

The notice was as follows :—

“To the Editor of The London ‘Free Press’ :

“Take notice that we are instructed by Beverly Burwell of this city, that he complains of the following article which appeared in the morning issue of the “Free Press” on Monday, the 14th of January, 1895, on the ground that the same is untrue and that this notice is given in pursuance of R. S. O. ch. 57, and amending Acts, and we hereby give notice of his complaint to the said article. The following is the article complained of.” (Here was inserted the alleged libel copied from the said paper.)

“Dated at London this 14th day of January, 1895.

“(Sgd.) MCEVOY, WILSON & POPE,
“Solicitors for Burwell.”

The notice was served upon John S. Dewar, city editor of the paper at the offices of the company ; and a similar notice, after the publication of substantially the same article in the evening edition of the paper, was served

upon Walter J. Blackburn, chairman of the board of directors of the defendant company, at the offices of the company. Statement.

The case was argued before MEREDITH, C. J., in Court, on September 17th, 1895. *R. U. McPherson*, for the plaintiff.

Shepley, Q. C., for the defendant.

September 19th, 1895. MEREDITH, C. J. :—

I determined at the close of the argument all the questions argued except one—that relating to the sufficiency of the notice as a notice to the defendant under R. S. O. ch. 57, sec. 5, sub-sec. 2.

The notice is addressed “to the editor of the *London Free Press*,” and towards the end of it it reads as follows : “and we hereby give you notice of his complaint to the said article.”

Is this a notice to the defendant such as is required by sub-section 2? I think not. The statute requires that the notice shall be given to *the defendant* in the action. The defendant is in this notice not referred to in any way, and having regard to the fact that the editor to whom it is addressed might be personally liable to an action for the libel and is equally with the publishers entitled to notice under sub-section 2 before such an action could be maintained against him, I cannot, I think, treat the notice as one addressed to and intended for the defendant. It appears to me that it is such a notice as the editor himself would be entitled to receive if an action were intended to be brought against him.

It may be urged that there is nothing substantial in the objection, as the notice must have come to the knowledge of the defendant, and that had there been no address upon it, and had it been served upon the editor at the place of business of the defendant, it would have been a good notice (*Archbold's Common Law Practice*, 14th ed.,

Judgment. 210); but I think that this does not help the plaintiff ;
Meredith, the notice being addressed to the "editor," there was no
C.J. duty cast upon him to bring it to the notice of the defendant. He may have dealt with it as a notice to himself personally, with which the defendant had no concern, and may not have brought it to the notice of the defendant. However that may be the statute requires that notice in writing should be given to the defendant, and I have no right to substitute something else for that which the Legislature has made a condition precedent to the bringing of the action.

It appears from the case that a similar notice after publication of substantially the same article in a subsequent edition of the newspaper, was served upon the chairman of the board of directors of the defendant company, but this does not, I think, help the plaintiff, as the notice being in the same form as the one I have been dealing with, is open to the same objection which I have held to be fatal to it ; and besides this there is nothing to shew that the action is brought for the libel contained in the second publication, and the notice not being in that case, directed to the libel complained of in the action, is of no avail.

The question for decision must, therefore, be answered in the negative. See *Hider v. Dorrell*, 1 Taunt. 383.

G. F. H.

[COMMON PLEAS DIVISION.]

JOHNSTON V. THE CONSUMERS' GAS COMPANY.

Toronto Gas Company—Reserve Fund—Plant Renewal Fund—Necessity for Establishment and Maintenance of—Investment of Surplus—Reduction in Price of Gas—50 Vict. ch. 85 (O.)—Construction of Parties—Attorney-General.

The defendants, an incorporated company, carrying on business in the city of Toronto as manufacturers and suppliers of gas, in 1887 obtained an Act, 50 Vict. ch. 85 (O.), whereby they were empowered to increase their capital stock from \$1,000,000 to \$2,000,000, such additional stock to be sold by public auction, and the Act provided that the surplus realized over the par value thereof should be added to their reserve fund, which they were thereby authorized to maintain, until the same should equal one-half of their paid-up capital, and that such reserve fund might be invested in Dominion or Provincial stock, municipal debentures, etc.; that a plant and buildings' renewal fund should be created out of the defendants' earnings, to which fund should be placed each year five per cent. on the value of plant and buildings, against which all usual and ordinary renewals and repairs should be charged; and that any surplus of net profit from any source whatever, including premiums on sales of stock after the establishment of the reserve and renewal fund, payment of directors, and a ten per cent. dividend, should be carried to a special account, and on such account becoming equal to five cents per 1,000 cubic feet on the quantity of gas sold in the previous year the price of gas during the then current year should be reduced by at least that amount.

In an action brought by the plaintiffs on behalf of themselves as well as all other consumers of gas:—

Held, that defendants were obliged to include in the rest or reserve fund (a) the moneys standing to the credit of the profit and loss account at the time of the passing of the Act, (b) the moneys to the credit of the contingent account at the same time, (c) and the moneys received from the premiums on the sale of the stock until the fund amounted to fifty per cent. of the paid-up capital; that the provision as to the nature of the investment of the reserve fund was obligatory, and it was *ultra vires* of the defendants to invest it, or any part of it, in the purchase or construction of plant or buildings, or in the business generally; or to invest the premiums on the sale of stock, or any part thereof, in the erection of buildings until the rest or reserve fund equalled one-half of the paid-up capital:—

Held, also, that the five per cent. directed to be carried to the plant and buildings' renewal fund should be so carried, notwithstanding that the usual and ordinary repairs did not amount to that percentage, and no obligation rested on the defendants to invest any unemployed part of this fund:—

Held, also, that the defendants had no right to write off sums from profits for depreciation in plant:—

Held, lastly, that the plaintiffs could properly maintain the action, and that the Attorney-General was not a necessary party.

THIS was a special case arising out of an action brought Statement.
by J. T. Johnston and the Toronto Type Foundry Company, Limited, who sued on their own behalf as well as

Statement. on the behalf of all other consumers of gas furnished by the defendants in the city of Toronto.

The pleadings and facts agreed on, and set out in the case, are sufficiently referred to in the judgment.

The questions to be determined by the Court were:—

1. Whether the plaintiffs, or either of them, have or has a right to maintain this action.

2. Whether the defendants were obliged to include in the rent or reserve fund which the Act 50 Vict. ch. 85 (O.), directed or authorized them to have (a) the moneys which the company had standing to the credit of profit and loss account (b) to the credit of contingent account at the time of the passage thereof; and (c) all the money received from the premiums of stock on the sale of stock authorized by the Act to be sold until the said fund amounted to fifty per cent. of the paid-up capital of the company.

3. Was it *ultra vires* of the company to invest or use the reserve fund or any portion of it in the purchase or construction of their plant or buildings, or in their business generally?

4. Was it *ultra vires* of the company to invest the premiums received on the sale of stock, or any part thereof, in the erection of buildings, until the rest or reserve fund had been found equal to one-half of the paid-up capital of the company?

5. Whether the defendants did establish, maintain, invest and use the rest or reserve fund in accordance with the provisions of this Act?

6. And, if not, in what respect the company failed to comply with the requirements of the Act in that behalf?

7. Has the "plant and buildings renewal fund" ever been created or maintained within the meaning of the Act?

8. After providing for all usual and ordinary repairs and renewals, was it *ultra vires* of the company to invest or use the surplus of the "plant and buildings renewal fund" in their general business, or was the fund to be kept separate from the other moneys of the company uninvested?

9. If the usual and ordinary repairs and renewals did not amount to as much as the five per cent. referred to in the Act, should the full five per cent. be carried to the credit of the plant and buildings renewal fund, or only sufficient to cover the usual and ordinary repairs? Statement

10. In addition to keeping the plant and buildings in repair by means of this fund, has the defendant company the right to write off sums of money from profits for depreciation in plant?

If the Court should be of opinion that the plaintiffs had not, nor had either of the plaintiffs, a right to maintain this action, then judgment is to be entered for the defendants with costs.

But should the Court be of opinion that the plaintiffs, or either of them, has a cause of action, then such judgment is to be entered in their favour, or in the favour of the plaintiff entitled, as the Court may think fit to direct.

The sections of the Act 50 Vict. ch. 85 (O.), on which the questions in the case arose, were the 1st, 2nd, 4th, 6th and 7th sections.

By the 1st section, power was given to increase the capital stock to \$2,000,000; and by the 4th section, all shares to be issued under the Act, were to be sold by public auction, "and all surplus realized over the par value of the shares so sold shall be added to the rest or reserve fund of the company, until the same shall be equal to one-half of the paid-up capital stock of the company. The true intent and meaning being, that the company may, at all times, have and maintain a rest or reserve fund, equal to, but not exceeding one-half of the then paid-up capital of the company, and which rest or reserve fund may be invested in Dominion or Provincial stock, municipal debentures, school debentures, drainage debentures, debentures of loan companies, and mortgages on real estate."

The 6th section provided that "There shall be created and maintained by the company, out of the earnings of the company, another fund, to be called the plant and buildings renewal fund, to which fund shall be placed each

Statement. year the sum of five per cent. on the value at which the plant and buildings in use by the company, stand in the books of the company, at the end of the then fiscal year of the company, and all usual and ordinary renewals and repairs shall be charged against this fund."

The 7th section provided that "Any surplus or net profit from any source whatever, including premiums on sales of stock, after the rest or reserve fund shall have been established and maintained as aforesaid, remaining at the close of any fiscal year of the company, after payment of fees to the president, vice-president, and directors of the company (not exceeding in all the sum of \$9,000 per annum), after payment of dividend at the rate of ten per cent. per annum on the paid up capital stock of the company, and the establishment and maintenance of the said rest or reserve fund, and providing for said plant and buildings renewal fund, shall be carried to a special account, to be known as the special surplus account; and whenever the amount of such surplus is equal to five cents per thousand cubic feet on the quantity of gas sold during the preceding year, the price of gas shall be reduced for the then current year, at least five cents per thousand cubic feet to all consumers."

May 31st, 1895. *C. Robinson, Q. C., and John MacGregor*, for the plaintiffs. The clear construction of the Act of Incorporation, 11 Vict. ch. 14, and the amending Act of 50 Vict. ch. 85 (O.), is that contended for by the plaintiffs, but, in any event; the Acts must be strictly construed against the defendant company and in favour of the plaintiffs, the consumers, who are mentioned in the latter Act, and a strict construction would be in accordance with the plaintiffs' contention: *Re Scottish Drainage and Improvement Co. v. Campbell*, 14 App. Cas. 139, 142; *Parker v. Great Western R. W. Co.*, 7 Scott. N. R. 835; *Webb v. Manchester and Leeds R. W. Co.*, 4 My. & Cr. 116; *Dowling v. Pontypool, Caerleon and Newport R. W. Co.*, L. R. 18 Eq. 714, 746;

Blakemore v. Glamorganshire Canal Navigation Co., 1 My. & K. 154, 162; *Countess of Rothes v. Kircaldy and Dysart Water Commissioners*, 7 App. Cas. 694, 707; *Scales v. Pickering*, 4 Bing. 449, 452; *Stockton R. W. Co. v. Barrett*, 11 Cl. & F. 590, 607. The reserve fund in the 4th section of the Act of 50 Vict. ch. 85 was to be invested in the securities mentioned for the benefit of the consumers, and though the word "may" mentioned in the Act is in general a permissive word, yet it should be construed as imperative where the interests of the public shew such a construction is beneficial to them: see Interpretation Act, R. S. O., 1887, sec. 8, sub-sec. 2, which is subject to the limitations in sec. 1, sub-sec. 7, and sec. 39. These sections did not alter the law as to the construction of the statutes, but merely declared what was already decided by the Courts here and in England to be the law: *Re Lincoln Election*, 2 A. R. 324, 341; *Regina v. Bishop of Oxford*, 4 Q. B. D. 245, 525; 5 App. Cas. 214, 231; *Regina v. Barclay*, 8 Q. B. D. 306, 311; 14 Eng. and Am. Encyclopædia of Law, p. 979; *Thompson v. Lessee of Carroll*, 22 How. U. S. 422, 434; *Malcom v. Rogers*, 5 Cowen N. Y. 188, 193; *The People, ex rel. Fiske v. Common Council of Brooklyn*, 22 Barb. 412. It was unlawful to invest in any other manner than the statute directed: *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & S. 154; *Bagshaw v. Eastern Union R. W. Co.*, 7 Ha. 114; *Munt v. Shrewsbury and Chester R. W. Co.*, 13 Beav. 1.

S. H. Blake, Q. C., *D. McCarthy*, Q. C., and *W. N. Miller*, Q. C., for defendants. The plaintiffs have no right to maintain this action either for themselves or in a representative capacity: *Atkinson v. Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; *Glossop v. Heston and Isleworth Local Board*, 12 Ch. D. 102, 113; Brice on *Ultra Vires*, 3rd ed., p. 752; *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D., pp. 449, 482, 502. No one but the Attorney-General on behalf of the public can bring such an action: *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.*,

Argument. 21 Ch. D. 752. Each consumer has a separate contract, and they cannot sue by one party as representing others: *Daniels* Ch. Prac., 6th ed., p. 232; *Weale v. West Middlesex Waterworks Co.*, 1 Jac. & W. 358; *Brice on Ultra Vires*, 3rd ed., 754. The investment of the reserve fund is a matter of discretion which the Court will not interfere with: *Taunton v. Royal Insurance Co.*, 2 H. & M. 135. The various funds have been established within the meaning of the Act. The plaintiffs have suffered no injury, as the investment in plant has yielded a larger return than if invested in the securities mentioned in the Act.

C. Robinson, Q. C., in reply. The action is properly constituted. One may sue on behalf of many where the relief sought is beneficial to all: Con. Rule 315; *Meux v. Maltby*, 2 Swanst. 277, 282; *Loyd v. Loaring*, 6 Ves. 773; *Gray v. Chaplin*, 2 S. & S. 267. The right of one to maintain an action on behalf of himself and others does not depend on the discretion of the Court, nor upon the disposition of others to concur: *Williams v. Salmond*, 2 K. & J. 463, 468. The objection cannot be taken by demurrer and has been waived by the defendants: *Young v. Robertson*, 2 O. R. 434, 439; *Werdermann v. Société Générale d'Electricité*, 19 Ch. D. 246, 250; Con. Rule 324. The Attorney-General is not properly a party in a case where a party or class can shew they have sustained damage by the non-observance of a statute: *Mayor of Devenport v. Plymouth, Devenport and District Tramways Co.*, 52 L. T. N. S. 161. See also *Mayor, etc., of Liverpool v. Chorley Waterworks Co.*, 2 De G. M. & G. 852, 860; *Municipality, etc., of Guelph v. Canada Co.*, 4 Gr. 632; *Hinckley v. Gildersleeve*, 19 Gr. 212; *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4; *Stockport District Waterworks Co. v. Mayor, etc., of Manchester*, 9 Jur. N. S. 267; *Cook v. Mayor, etc., of Bath*, L. R. 6 Eq. 177, 180; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *Wallusey Local Board v. Gracey*, 56 L. J. N. S. Ch. 739. The investment in plant has not been of the benefit contended for. The plant is excessive and useless, and

the plaintiff is entitled to the loss of interest which would have been earned had the investments been made in the manner required by the Act. Argument.

September 9, 1895. FERGUSON, J. :—

The plaintiffs, who are Johnston and The Toronto Type Foundry Company, Limited, bring the action on their own behalf, as well as on behalf of all the consumers of gas furnished by the defendants in the city of Toronto.

The matters in difference come before me in the form of a special case, and not upon evidence in the ordinary way. This case, however, provides that the pleadings which are said to be annexed to it may be referred to as shewing the questions in issue.

The 15th paragraph of the case states and admits that the plaintiff Johnston has been a consumer of gas since 1887, and has paid large sums of money to the defendants therefor ; that in January, 1893, the plaintiffs, The Toronto Type Foundry Company, Limited, notified the defendant company that they had purchased Johnston's business, and that for the then future all gas bills were to be charged to the Type Foundry Company ; that this, however, was not done, and the plaintiff Johnston is and always has been liable to the defendant company therefor ; and that the plaintiff Johnston is the managing director, and the largest stockholder in the Type Foundry Company.

The plaintiffs in their statement of claim say, and it is not questioned, that the defendants are an incorporated company doing business in the city of Toronto and its suburbs, and suppliers of gas for lighting and heating purposes. They then refer to the Act of Parliament under which the defendants were incorporated, which is an Act of the Parliament of Canada, passed in the eleventh year of the reign of Her Majesty, chaptered 14, and several other Acts of the late Province of Canada and the Province of Ontario, by which additional rights, powers, privileges and liberties were (as the plaintiffs say), given to the defendant company.

Judgment.**Ferguson, J.**

The plaintiffs say that immediately after the incorporation of the defendant company they began to manufacture gas, and to supply a large number of the citizens of Toronto and suburbs with gas for lighting and heating purposes, for which they were paid large sums of money by the citizens; and that prior to the 23rd day of April, 1887, the defendant company, being desirous of increasing their capital stock, presented a petition to the Legislative Assembly of the Province of Ontario for authority so to increase their capital stock and the amount of their real estate to meet the requirements of the rapidly increasing population of the city of Toronto, and that thereupon an Act was passed in the 50th year of the reign of Her Majesty, entitled "An Act further to extend the powers of The Consumers' Gas Company of Toronto," and chaptered 85, which Act came into force on the 23rd day of April, 1887.

The plaintiffs then set forth in a general way the provisions of the first, second, fourth, sixth and seventh sections of this Act, and say that since the passing thereof they, the plaintiffs and all other consumers of gas in the city of Toronto and suburbs, have been large consumers of gas, and have paid therefor large sums of money to the defendant company, and as such consumers have a right to the enforcement of the provisions of the aforesaid Act of 1887 in their favour as against the defendant company.

The plaintiffs then state that at the time of the passing of this Act in 1887, the defendant company had a surplus of profits in hand which was to have formed the nucleus of the rest or reserve fund, which at that time amounted to the sum of \$394,310.00.

They then refer to certain sales by the defendant company of the increased capital stock made under the provisions of the Act of 1887, on which was realized a very large sum of premiums (above the par value), which, if added to the rest or reserve fund in hand as aforesaid, would have been more than sufficient to establish the rest or reserve fund mentioned in the fourth section of the Act, and which should have been invested in some one or

more of the securities mentioned in the fourth section of Judgment
the Act. Ferguson, J.

The plaintiffs then charge that the defendants in fraud of them, and contrary to the provisions of the said Act of 1887, instead of forming the rest or reserve fund as directed by the Act, and investing the same as therein directed, used the moneys for other purposes, and invested the same in plant and material contrary to the intention and meaning of the fourth section of the Act.

The plaintiffs further say that the defendants in fraud of them instead of forming and creating a "plant and buildings' renewal fund," as directed by the 5th section of the Act, neglected and refused to form the same, and used the moneys received by them from premiums and profits for their own uses and other purposes than those directed by the Act.

The plaintiffs then charge that the defendant company (in addition to the two sums of reserve and premiums aforesaid which they say have been misapplied) have made large profits in their business from the time of the passing of the said Act of 1887 down to the present time amounting to about \$250,000, which should have been applied by the defendant company in forming the special surplus account to be used in the reduction in the price of gas to the plaintiffs from time to time as the same was earned since 1887.

The plaintiffs claim that by reason of such misappropriation of funds the defendants have lost the interest which, but for it, would have been received from the investment of the reserve fund under the fourth section of the Act from the 31st of March, 1887, to the 30th of September, 1893, which amounts to a very large sum, and which should have been applied in the reduction of the price of gas to the plaintiffs as provided by the said Act.

The plaintiffs also say that on the 3rd day of October, 1893, the defendants under the provisions of the Act offered another \$100,000 of the increased capital stock for sale, and received the sum of \$83,040 premiums thereon,

Judgment. which should be added to the special surplus account, and **Ferguson, J.** used in reduction of the price of gas charged to them, the plaintiffs.

There is then alleged a request before action by the plaintiffs of the defendants to comply with the provisions of the Act, for an account and repayment of sums over paid by the plaintiffs, and a refusal by the defendants.

It is then alleged that the defendants claim to have the right to use and will, unless enjoined from so doing, use the said sum of \$83,040 in their business, and in the purchase and construction of plant, and that they threaten and intend to use the profits arising from this business in the purchase of permanent or other plant contrary to the provisions of the Act of 1887.

The plaintiffs then claim a return of sums that they say have been over paid in the past to the defendants, and ask an account of the receipts and disbursements of the defendants since the 23rd day of March, 1887; a mandatory order directing the defendants to comply with the provisions of the Act; a declaration of rights; a declaration that the defendant company are trustees, etc., etc.; and an order restraining the defendants from misapplying the said sum of \$83,040.

By their defence the defendants admit that they were incorporated as stated by the plaintiffs, and that they are subject to the Acts of Parliament and the several Acts of the Legislative Assembly referred to by the plaintiffs, but do not admit the correctness of the plaintiffs' statement as to the terms and effect of the same.

They admit that since their incorporation they have manufactured gas and supplied a large number of citizens of Toronto with gas for lighting and heating purposes.

They say that by the proper construction of the Acts relating to their rest or reserve fund, and plant and buildings' renewal fund, they are not restricted in making investments to the specified securities, but are entitled to invest the same, or part thereof, in the general business of the company.

They deny that they have ever acquired within the Judgment. meaning of the Acts referred to a rest or reserve fund at Ferguson, J. any time amounting to half the paid up capital of the defendants. They deny that their surplus of net profits has ever amounted to such a sum as would impose on them the duty of reducing the price of gas under the provisions of the Acts of 1887 above referred to, but say that they have voluntarily, from time to time, reduced the price of gas to a much greater extent than it would have been incumbent on them to do had they acted in the premises in accordance with the plaintiffs' contentions; and they say that all consumers of gas furnished by the defendants have paid to the defendants less therefor since the passing of the Act of 1887, than the defendants had a right to charge and collect.

The defendants also demur to the statement of claim on the grounds (1) that it shews no cause of action; (2) that the plaintiffs have no *locus standi* to bring the action against the defendants, or to claim the relief sought for; (3) that the plaintiffs do not represent, and cannot sue on behalf of the public, or that portion of the public interested in the matters in question; and, on general grounds, sufficient in law sufficient to sustain the demurrer.

Such is the record (somewhat abbreviated, though still very long) to which I am to look to discover the issues between the parties. And it is owing to the questions discussed at the bar as to whether or not the Attorney-General should have been a party; as to whether or not the plaintiffs can sustain an action of this character; and even assuming that they can do so, then do the plaintiffs sufficiently represent the others on whose behalf they profess to sue, to enable them to sustain the action in this form, that I have referred to the pleadings at so great length.

By the defendants' original charter their capital stock was a comparatively small sum. But by the various intermediate Acts referred to, this had been increased, till before the application for the Act of 1887 it was one million dollars.

Judgment. By the 8th section of the original charter, 11 Vict. ch. 14, dividends exceeding ten per centum per annum could not be declared out of the profits of the undertaking, and this restriction or limitation still continues to exist. Only ten per centum per annum can be paid to the stockholders.

Ferguson, J.

Up to the time of the application for the Act of 1887 there does not seem to have been any restriction upon the defendants as to the price they might charge for gas, or the amount of profits they might actually derive from their operations under their charter, except so far as a restriction may be implied from the limitation of the dividends to be paid.

At that time, as stated and admitted in the special case, the defendants applied for an Act empowering them to increase their capital stock by one million dollars (such an increase bringing it up to two million dollars). It is admitted that the application was opposed by the city of Toronto, and that after many discussions before the Private Bills Committee the Act was passed.

As the real position of affairs at that period before the Legislature may be considered of some importance, I set forth a clause from the 39th annual report of the defendants having relation to it. This report, amongst others, is attached to the special case, and these were all, so far as considered needful, freely referred to on the argument. It is this:—"Application was made to the Legislature of Ontario at its last session for power to increase the capital stock of the company to \$2,000,000, the new stock to be allotted to the stockholders as has been usual, *pro rata* at par. This last provision was most strenuously opposed by the city of Toronto represented by the mayor, and by other members of the legislative committee of the city council, principally on the ground that it would be a bonus to the stockholders, which, it was claimed, was not contemplated when the company obtained its charter. After many protracted discussions at which the representatives of the company strongly advocated and supported the

right of the company to such an allotment, it was finally considered prudent, rather than to withdraw the bill to consent to a compromise, and at the same time to settle forever the vexed question of the company's right to accumulate a reserve fund, and by so doing pursue a conciliatory course with the city, between whom and the company the directors consider the most harmonious relationship should always exist. A bill drawn out in accordance with the terms agreed upon was ultimately passed by the Legislature, a copy whereof has been mailed to all the stockholders."

Judgment.
Ferguson, J.

Such seem to be, according to the statements of the defendants themselves, the circumstances in which the Act of 1887 was passed.

The case admits and states that at the time of the passing of this Act (1887), the defendants had accumulated \$394,310.27 out of their profits, after payment of the dividends to the shareholders; that of this sum \$322,830.24 was standing to the credit of "profit and loss," and \$71,480.03 to the credit of "contingent account" as of October 1, 1886; that of the amount at the credit of profit and loss \$305,037.92 was at that date invested in municipal debentures, and the residue in the business of the company, and that these sums amounting together to the sum of \$394,310.27 it is presumed constituted the rest or reserve fund referred to in the fourth section of the Act of 1887.

The case also admits and states (giving the figures somewhat in detail) that after the passing of the Act of 1887, and up to and inclusive of the year 1891, the defendants sold of the new stock issued, in pursuance and under the authority of the Act of 1887, \$600,000, and that the premiums upon such sales over and above the par value of the stock so sold amounted to \$455,482.24. And that on the 2nd day of October, 1893, a further lot of such stock of \$100,000 was sold by the defendants, in respect of which the premiums above the par value amounted to \$83,042.25, the total premiums realized by the defendants from the

Judgment. sales of the \$700,000 of this new stock being the sum of
Ferguson, J. \$533,524.71. But that on the 1st day of October, 1893, the amount received from premiums was only the sum of \$455,482.26. The remaining sum, the \$83,042.45, having been received in the defendants' financial year commencing on the said 1st day of October, 1893. And it is by the case stated and admitted that these sums were deposited in the defendants' general bank account which was drawn upon as required for the payment of the purchase money of land, and the erection of buildings and plant, and for the general business of the company, the defendants, they keeping but one bank account.

This action was commenced on the 22nd day of February, 1894.

Only the above referred to sum of \$700,000 of the new stock authorized by the Act of 1887 has been issued. The remaining \$300,000 so authorized is yet unissued.

The case also states and admits that the defendants, after the passage of the Act of 1887, opened an account in their books called the "reserve fund account," at the credit of which on the 1st day of October, 1893, stood the sum of \$742,758.13; that of this amount there was at this date \$221,967.37 invested in municipal debentures; that on the 1st of October, 1894, there was \$129,246.53 in debentures, and that the residue of the said sum of \$742,758.13 had prior thereto been invested or expended in the construction or acquisition of lands, buildings and plant for the purposes of the defendants' business.

The second question asked by the case is whether the defendants were obliged to include in the rest or reserve fund which the Act of 1887 directed or authorized them to have (a) the moneys which the defendants had standing to the credit of profit and loss account; (b) to the credit of contingent account at the time of the passage thereof, and (c) all the money secured from the premium of stock on the sale of stock authorized by the Act to be sold until the said fund amounted to fifty per cent. of the paid up capital of the defendants?

The answer to this question must, I think, be in the Judgment. affirmative; as it appears to me that the fourth section Ferguson, J. of the Act of 1887 provides for this being done, and makes it obligatory upon the defendants to do it. The sums referred to under (a) and (b) in this question taken together are the sum of \$394,310.27, which it is said in the second paragraph of the case it was presumed constituted the rest or reserve fund referred to in this fourth section of the Act, and, after a perusal of all that has been brought before me, I do not entertain any doubt that such presumption is correct. There can, I think, be no other fund designated or even imagined to which the language of the section could be made to apply, and I think the language used in the circumstances then existing, plainly refers to this fund as "the rest or reserve fund of the company," and the fourth section, after providing for the manner of the sale of the stock issued under the provisions of the Act, says: "And all surplus realized over the par value of the shares so sold shall be added to the rest or reserve fund of the company until the same shall be equal to one-half of the paid up capital stock of the company, the true intent and meaning being that the company may at all times have and maintain a rest or reserve fund equal to, but not exceeding, one-half of the then paid up capital of the company."

It will be observed that in the earlier part of this provision the words "*shall* be added" are employed, and in the latter part of it, "that the company *may* at all times have and maintain," are the words used. It will be borne in mind that at the time of the passing of the Act, the right of the company to accumulate a "reserve fund" was, in their own opinion, a "vexed question" which was settled by the provision permitting them to have and maintain such fund, defining the extent of it by saying that it should not exceed a certain amount; but the words providing for the moneys that should go into and constitute such fund are, as it seems to me, positive and obligatory as language can be. And any surplus of such moneys there might be

Judgment. over the amount permitted as a rest or reserve fund is, amongst other things, provided for by the seventh section of the Act, the eighth section providing for the only case in which this rest or reserve fund should be drawn upon.

Ferguson, J.

I am not impressed with the contention that the difference between \$322,830.24, the amount standing to the credit of profit and loss, and \$305,037.92, the amount at the time of the application for the Act of 1887 invested in municipal debentures, a sum of something over \$17,000 of profits having been used in and then being in the business of the company, affords a reason for the conclusion that the company were at liberty to use the reserve fund contemplated by the Act in their business generally. The provisions of the statute seem to me to entirely forbid such a conclusion.

I repeat, and it seems to me clear that this second question must be answered in the affirmative.

The third question is:—Was it *ultra vires* of the company to invest or use the reserve fund or any portion of it in the purchase or construction of their plant or buildings, or in their business generally?

This question must, I think, also be answered in the affirmative.

The eighth section of the Act of 1887 provides, as I think, plainly for the application of the reserve fund, and provides in words that the fund shall not otherwise be drawn upon. The fund is, I think, a fund that, according to the scope and provisions of this Act, should be kept in hand for the purpose of meeting, if need should be, the contingency or contingencies referred to in this eighth section. However unreasonable it may appear to some that so large a fund should be kept for purposes that may not and probably will not come into existence, the provisions of the Act on the subject seem to me clear and positive; and according to the view expressed by Lord Watson in the case *Countess of Rothes v. Kirkcaldy Water Works Commissioners*, 7 App. Cas., foot of p. 707 (a view that is also found stated in other decisions), the provisions of an Act

such as this one must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature. Judgment.
Ferguson, J.

I am of the opinion that the company had not power or the right to use the reserve fund, or any portion of it, in the purchase or construction of their plant or buildings, or in their business generally, and that the answer to this third question must, as already said, be against the defendants.

The fourth question is:—Was it *ultra vires* of the company to invest the premiums on the sale of stock, or any part thereof, in the erection of buildings until the rest or reserve fund had been found equal to one-half of the paid up capital of the company?

The answer to this question should, as I think, also be in the affirmative. The premiums meant are the premiums on the sale of the new stock. These were, by the provisions of the Act, as I understand them, to be added to the fund then in hand, and called the rest or reserve fund of the company until the same should equal one-half of the paid up capital of the company to form the contemplated rest or reserve fund, the position of which I have before spoken of as fully as I think necessary.

A question I am not, so far as I see, asked, is, whether or not such premiums could be so employed after the reserve fund had been found equal to one-half of the paid up capital, and as to this I only call attention to the second line of section seven of the Act.

The fifth question is, whether the defendants did establish, maintain, invest and use the rest or reserve fund in accordance with the provisions of the Act?

The answer to this should be, I think, in the negative. What the case says in this regard is, that the company after the passage of the Act opened an account in their books called the "reserve fund account," at the credit of which on the 1st of October, 1893, stood the sum of \$742,758.13; that of this sum there was on that day \$221,967.37 invested in municipal debentures; and on the

Judgment. 1st day of October, 1894, there was \$129,246.53 in debentures; and the residue of the said sum of \$742,758.13 had prior thereto been invested or expended in the construction or acquisition of lands, buildings and plant for the purposes of the business. Further than the amount represented by debentures in hand, this was not, in my opinion, a compliance with the requirements of the Act at all. From what I have before said regarding the contemplated reserve fund, my reason for saying this will appear. Opening the account and making entries and figures thereat are, as I think, no compliance with the requirements of the Act respecting the rest or reserve fund, except so far as there may be in hand the cash or securities of the kind mentioned in the last clause of section four of the Act.

The Act does not authorize, and, in my opinion, it forbids the so called "investment" of the reserve fund or any part of it in the construction or acquisition of lands, buildings and plant for the purposes of the business of the defendants.

As to the investment of the contemplated reserve fund, the language is that it *may* be invested in Dominion or Provincial stock, in municipal debentures, school debentures, drainage debentures, debentures of loan companies, and mortgages on real estate. Last clause of section four.

By the interpretation Act the word "shall" is to be construed as imperative, and the word "may" as permissive.

It was contended that here the word "may" should be read *shall*, and that the company was bound to invest this contemplated reserve fund when it came into their hands in the securities mentioned, or some of them.

It is true that the word "shall" is sometimes substituted for the word "may," as in *The People v. Common Council of Brooklyn*, 22 Barb. 412, where it was considered that the good sense of the whole enactment required the change. In Kent's Commentaries, vol. 1, 467, it is said the word "may" in a statute, means *must* or *shall* when the public interests or rights are concerned, or the public or third persons have a

claim *de jure*, that the power shall be exercised, the Judgment. author referring to many decided cases, some of which are Ferguson, J. English and some American. In *The King v. Barlow*, 2 Salk. 608, it is said that where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*. The illustration given is: where by a statute a sheriff may take bail, the construction is that he must take it, for he is compelled so to do.

When, however, I look at the situation of this contemplated fund and the purposes of its existence, the objects to which it is, by the provisions of the Act, to be applied, and so far as I can understand it, the scope of the Act, I do not think that the present instance falls under any of the authorities on the subject that I have seen, or that I should be warranted in saying that the company was bound by the Act to invest this fund or any part of it. I think the statute left it in the discretion of the company to say whether they would do so or not. But if the company should invest the fund or any part of it, they would be bound to make the investment in the securities mentioned, or some of them.

As to the sixth question, I am of the opinion that so far as an answer to it does not already appear, I am not properly called upon to answer it.

The seventh question is: Has the plant and building renewal fund ever been created or maintained within the meaning of the Act?

I am of the opinion that it does not appear that this fund has been created or maintained as required by the sixth section of the Act. There seems to me to be a vast difference between creating a fund and opening an account in a book and making entries thereat; and, even if the contrary view were taken, the fund as appears by paragraph nine of the case, was not maintained even by credit entries at the account.

The eighth and ninth questions may be conveniently dealt with together.

Judgment. The eighth question is: After providing for all usual
Ferguson, J. and ordinary repairs and renewals, was it *ultra vires* of the company to invest or use the surplus of the plant and buildings' renewal fund in their general business; or was the fund to be kept separate from the other moneys of the company uninvested?

The ninth question is: If the usual and ordinary repairs and renewals did not amount to as much as the five per cent. referred to in the Act, should the full five per cent. be carried to the credit of the plant and buildings renewal fund, or only sufficient to cover the usual and ordinary repairs?

The answer to these questions, as I think, is this: The statute provides and requires that this fund shall be created and maintained by the company out of the earnings of the company. The fund appears on the face of the Act to be a measured fund, limited to the five per cent. mentioned in the sixth section, no more and no less, and looking at the circumstances in which the Act was passed, which I have before alluded to, it would appear to be a fund, the amount of which, to answer the purposes intended and expressed, was estimated and agreed upon. The positive provision of the statute is, that the fund should be created and maintained in the way pointed out in the Act; and I find no guarantee for saying that this fund may, for any reason, be more or less than the amount prescribed by the Act; or that the fund or any portion of it, may properly be used in the general business of the company, or diverted from the purposes mentioned in the Act and used for any other purpose whatever. Owing, however, to the manner in which section seven of the Act is framed, and the positive provisions of section six, I do not see that the plaintiffs or those whom they profess to represent, have any interest in any surplus there may be of this fund. As to whether or not any part of this fund remaining unemployed, should be invested, the Act seems to be entirely silent. As I have before said, I apprehend it was an estimated fund supposed to be sufficient for its intended

purposes, and no more than sufficient therefor, and the subject of any investment of it was probably not considered important. All that I am in a position to say on this subject is, that I do not perceive any objection to the investment of any portion of this fund remaining unemployed in such securities as would be readily available in case the funds should be required; but I do not see any obligation resting upon the company so to invest.

Judgment.

Ferguson, J.

The tenth question is: In addition to keeping the plant and buildings in repair by means of this fund (the plant and buildings renewal fund), has the defendant company the right to write off sums of money from profits for "depreciation in plant"?

The 12th paragraph of the case states that the defendant company had charged against profits the sum of \$15,000 in the year 1890 for "depreciation on street lamps;" and in 1891, a further sum of \$43,000 for "a depreciation on street lamps," was charged against the reserve fund account.

The 12th paragraph of the case also states that the depreciation in street lamps took place in a portion of the company's plant that was not intended to be renewed or repaired, and which was in fact no longer of any use, and was of little if any value to the company.

These were the items in respect of which the argument took place; and it was said that the company had ceased to use a large number of street lamps, owing to other lights taking their place, and that without any fault on the part of the company these lamps became useless and of little if any value.

I am now of the opinion that these sums should have been charged, if at all, against "the plant and building renewal fund"; and my answer to the tenth question is in the negative. I think "the plant and building renewal fund" was, as I have before stated, an estimated fund considered sufficient to keep the plant and buildings in proper condition; and that the company are not authorized after the employment of this fund, or in addition to hav-

Judgment. ing the fund for this purpose to write off sums from the profits for any "depreciation in plant."

Ferguson, J.

I have chosen to reserve the first question asked to be the last one answered.

This first question is: Whether the plaintiffs, or either of them, has or have a right to maintain this action.

The defendants, I will assume, were and are bound to adhere to the powers conceded to them by the Act. They were permitted to increase their capital stock as stated in the Act, but upon the terms and conditions also stated in the Act. Their right to have a reserve fund was affirmed by the Act, but that they have upon the terms and conditions stated in the Act, and in regard to that part of their business falling under the provisions of the Act, they were bound to adhere to the powers given them, and to do no more than the Act sanctioned, and to proceed only in the mode pointed out by the Act. Yet as pointed out by Lord Cranworth, in *Mayor, etc., of Liverpool v. Chorley Waterworks Co.*, 2 DeG. M. & G. 852, at p. 859, it does not follow that any one has a right to complain whenever powers of this nature have not been strictly followed, or are intended to be transgressed. In such cases a plaintiff seeking assistance by way of injunction, is bound to shew that he has an interest in preventing the defendants from doing what is in fact, or may well be called a violation of their contracts with the Legislature. He must shew not only that the defendants are committing, or intend to commit a wrong; but also that the wrong complained of, does occasion, or will occasion, loss or damage to him; that he has a special or private interest in confining the defendants within the limits of their Parliamentary powers.

Then looking at the provisions of the Act, especially those of the seventh section of it, the allegations in the statement of claim and the admissions in the special case in respect to the position of the plaintiffs as consumers of gas furnished by the defendant company, I am of the opinion that the plaintiffs have a special or private interest in confining the defendants within the limits of the powers

given them by the Act; and, without saying more, that the plaintiffs fall within the boundaries of the law on the subject as stated as above by Lord Cranworth. The Act is a private Act, and the matters in question are not matters in which the whole public have concern. The plaintiffs are, I think, in a position to maintain the action. Judgment.
Ferguson, J.

Then are the plaintiffs in a position to maintain the action as well on their own behalf, as on behalf of those whom they profess to represent, namely, all other consumers of gas furnished by the defendants in the city of Toronto?

It does not appear to me that in respect to an action of this character, Rule 315 adds anything to the law or practice as it existed in the Court of Chancery before the passing of the Judicature Act. In the 5th ed. (1871), of Daniel's Practice, the author, after stating observations of Lord Cottenham in the cases *Walworth v. Holt*, 4 M. & C. 619, and *Mozley v. Alston*, 1 Phil. 790, and referring to some other cases, says, at p. 212: It is generally necessary, in order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, that it should appear that the relief sought by him, is beneficial to those whom he undertakes to represent; where it does not appear that all persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained".

The plaintiffs here seek to have the defendants compelled to observe the provisions of the Act of the Legislature, that I have so often referred to, to the end that under the provisions of the seventh section of it, they may obtain a benefit by the reduction, or a reduction in the price of gas consumed or to be consumed by them and furnished by the defendants. And in regard to this, it seems to me quite plain that if the plaintiffs obtain this relief it will necessarily be an advantage to the other consumers of gas in the city furnished by the defendants; and that they in this respect stand in the same position as do the plaintiffs. I do not see that this is a case in which any general inter-

Judgment. ests of the public at large are concerned, or any rights or
Ferguson, J. interests of the Crown are directly or incidentally brought
in question. I am of the opinion that the Attorney-Gen-
eral is not a necessary party plaintiff or defendant, and
that the action as it stands is properly constituted. See
also *Mayor, etc., of Devenport v. Plymouth, Devenport and
District Tramways Co.*, 52 L. T. N. S. 161.

The 19th paragraph of the special case, states that
the figures mentioned in the case, are for the purposes
of the case only, and should a reference be directed they
are not to be binding upon either party on such reference.

The 10th paragraph of the special case shews, amongst
other things, that in the year 1893, while the paid up
capital of the defendants was \$1,600,000, the amount
invested by them in work, plant, and trade materials, was
\$2,576,360.71, a sum exceeding the paid up capital by no
less an amount than \$976,360.71.

If it should finally appear that the ability to make this
very large investment in works, plant, etc., has arisen by
neglecting to observe the provisions of the statute direct-
ing the creation establishing and maintenance of the funds
therein mentioned, and neglecting to apply the profits as
therein directed, and that this was intended to or should
ultimately be to the advantage of the shareholders over and
above the advantages given them by the various Acts of
Parliament mentioned and referred to in the pleadings and
case defining the position and powers of the defendants,
it will be found that what cannot be done directly, the
law will not permit to be done indirectly or by indirect
means, or by any indirect and circuitous contrivance:
Booth v Bank of England, 7 Cl. & F. 509, at p. 540, refer-
red to in Pollock on Contracts, 6th ed., 280. If an affirma-
tive statute which is introductive of a new law, direct a thing
to be done in a certain manner, that thing shall not, even
though there are no negative words, be done in any other
manner: *Cook v. Kelly*, 12 Abbott's, P. R. (N. Y.) 36 and
37; Dwaris on Statutes, 2nd ed., p. 641.

A company incorporated by Act of Parliament, cannot

exercise its powers or apply its capital except in strict conformity with the Act: *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & S. 154. Judgment. Ferguson, J.

The powers of a corporation established for certain specified purposes, must depend on what these purposes are, and except so far as it has express powers given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted: *The Queen v. Sir Charles Reed*, 5 Q. B. D., 483, at p. 488.

The last clause in the special case, provides that if the Court be of opinion that the plaintiffs, or either of them, has a cause of action, then such judgment is to be entered in their favour, or in favour of the plaintiff entitled, as the Court may think fit to direct.

In this case I do not distinguish between the plaintiffs. They are for purposes here, as it appears to me, one, the name of the other being added or employed for greater security against technical objections.

I am, as I have already indicated, of opinion that the plaintiffs have a cause of action against the defendants, and that this action is well and properly constituted.

The case comes before me in a manner that is unusual. As I understand it, I am not for the purpose of any final judgment, especially if there is to be a reference, which I think there must be, to employ the figures in the special case. The case stated seems to stand in the place usually occupied by the evidence, and yet the statements made are not to be entirely conclusive. This may almost be said to be unique.

The judgment will be in favour of the plaintiffs, declaring that they, the plaintiffs, are entitled to have account taken substantially as asked by the first paragraph of the prayer of the statement of claim; and an account respecting what, if anything, has been done in or towards creating and maintaining the respective funds mentioned or referred to in the Act of 1887. The accounts to be taken

Judgment. will, as I think, necessarily be accounts comprehending
Ferguson, J. the whole business of the defendants done since the passing of that Act, including the surplus, profits in the hands of the defendants at the time that Act was passed, to the end that it may appear what sums would, if the defendants had rendered strict obedience to the provisions and requirements of that Act, have been carried to the special account, to be known as the "special surplus account," mentioned in the seventh section of the same Act.

It will, as I think, be necessary and convenient to direct that several accounts, each designated or described, shall be taken so as to manifest what is above said as to the special surplus account.

I do not delay here to define these several accounts, but, if need be, I will hear counsel upon the settling of the minutes of the judgment in respect to them.

If the defendants still have in hand the \$83,040, secured by them as premiums on the last sale of stock under the Act, I think they should not employ it or any part of it otherwise than as directed by the Act; but it is probably not necessary or prudent to make a restraining order with regard to this. Nor do I think it prudent at present to make any of the mandatory orders that are asked. All these may stand to be discussed on further directions, when it may be hoped that there will be more light and accurate knowledge than at present, there being liberty to apply meantime, in case any now unforeseen matter should come to light.

The demurrer will be overruled with costs, and I think the defendants should pay the plaintiffs' costs of the action down to this judgment. Further directions and all subsequent costs will be reserved till after the report.

The reference will be to the Master in Ordinary.

G. F. H.

[COMMON PLEAS DIVISION.]

FISHER V. WEBSTER ET AL.

Way—Conveyance of "Road"—Effect of—Grant of Right of Way merely.

A deed, after granting certain land describing it by metes and bounds, continued, "also a road forty feet wide" adding to the description thereof "and not included in the above quantity of land":—

Held, that by the conveyance of the road the fee in the freehold therein did not pass to the grantee, but merely an easement of the right of way over the land.

Review of the American decisions.

THIS was an action tried before FERGUSON, J., with- Statement.
out a jury, at Hamilton on the 10th April, 1895.

Osler, Q. C., and *Gwyn*, for the plaintiff.

G. Lynch-Staunton and *Waddell*, for the defendants.

At the conclusion of the case the learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated.

September 7th, 1895. FERGUSON, J.:—

The plaintiff alleges that at the time of the committing of the grievance of which she complains she was and still is the owner of the lands particularly described in the statement of claim; that there was at that time standing and growing upon this land a large number of valuable oak and other ornamental and timber trees of peculiar value to the plaintiff; that the value of the land was greatly enhanced by such trees; and that, in or during the months of September, October, or November, 1894, the defendants, with their servants and workmen, wrongfully broke down and damaged the plaintiff's fence and went upon the plaintiff's land and cut and pulled down and carried away the said oak and ornamental trees of the plaintiff. The plaintiff then claims \$1,000 damages, and an injunction restraining the defendants from a repetition of the acts complained of. She also claims costs.

Judgment. The defendants say that, on or about the 11th day of September, 1855, one John McIlroy conveyed to one Joseph Webster, amongst other lands, a certain piece of land called a road, which is more particularly described in the conveyance as follows: "Also a road forty feet wide, the western boundary of which, on a course of south thirteen degrees east, extends from the south-west angle of the tract in the first concession six chains and eighty-two links, and is not included in the above quantity of land."

Ferguson, J.

The defendants then say that if this piece of land called a road is included in the lands mentioned in the plaintiff's statement of claim then they say that the plaintiff has no claim whatever to the part thereof which includes the said piece of land called a road, but that the defendant Frances Webster is the sole and only owner thereof.

The defendants further say that Joseph Webster and Frances Webster have been in quiet and undisturbed possession and occupation of this piece of land called a road since the 21st of May, 1855, and that neither of the defendants has ever been guilty of any acts of trespass on any part of the plaintiff's land.

The plaintiff, by way of reply, after joining issue, says that even if the said road forty feet wide, or any part of it, was at any time vested in the defendant Frances Webster, or in any one from whom she claims (which she does not admit), the defendants' right or title to the same is barred by the Statute of Limitations, the road having been in the possession of the plaintiff and her predecessors in title, without hindrance or molestation, for over twenty years.

The fact of the acts of the cutting of the trees and the breaking of the fence alleged was not denied; nor was it disputed that these acts were done upon the parcel of land that, as the defendants say, is called a road. If these, or either of them, were denied, the evidence respecting them seems conclusive in the plaintiff's favour.

The defendant William Mannel does not profess to be the owner of any of the land referred to in the case or

the evidence. He was a person in the employment, or who had been in the employment, of the defendant Frances Webster. Judgment.
Ferguson, J.

The contention between the parties was in regard to the title. The plaintiff claimed title to the strip of land forty feet wide and six chains and eighty-two links long. The defendant Frances Webster claimed title to the same parcel or strip of land, saying that it came to her through conveyances in which it was called a road, she claiming it also by length of possession.

The whole of a block or parcel of land, embracing the lands of the plaintiff and those of the defendant Frances Webster and comprehending this road forty feet wide, was the property of the late Dr. James Hamilton, and the titles of both parties came from him.

In the year 1843, Hamilton conveyed a part of this block to McIlroy and others, and in the conveyance, immediately after a particular description of land by metes and bounds, occur the words: "Also a road forty feet wide, the west boundary of which, on a course south thirteen degrees east, extends from the south-west angle of the tract in the first concession six chains and eighty-two links, and is not included in the above quantity of land." The lands particularly described in this conveyance consisted of two "tracts," one being in the first and the other in the second concession. It seems necessary to say this in order to an understanding of the words employed as above. There was and is a highway to be used by the owners of the lands so conveyed to McIlroy and others, so that no question as to a way of necessity arises.

It was not in the end disputed, as I understood, that the title that passed by that conveyance to McIlroy and others, so far as conveyances have concern, went to the defendant Frances Webster, nor that the title of the remainder of the block or parcel owned by Hamilton, so far as the conveyances have concern, came to the plaintiff; and were it not that both parties make claims by virtue of the Statute of Limitations, there would seem to be only the one question,

Judgment. which would be as to the effect, or rather the meaning,
Ferguson, J. of the words above quoted from the conveyance from Hamilton to McIlroy and others, which are regularly repeated in the respective conveyances made afterwards down to the defendant Frances Webster.

In the conveyance of the lands that remained in Hamilton after his conveyance to McIlroy and others aforesaid, by the representatives of Hamilton to Mr. Begue, this same road is referred to in this way: "Subject to a right of way (if any) to one Joseph Webster, on the westerly side of said property."

This road, or supposed road, extended from one angle of part of the land conveyed to McIlroy and others along the westerly limit or boundary of Hamilton's remaining lands, as was contended, to a stone road; but, according to the only evidence on the subject at the trial, the six chains and eighty-two links would not reach to the margin of that road.

The above-mentioned conveyance to Mr. Begue, is dated the 29th day of November, 1877. The owner of the land on the westerly side of and adjoining this road, or supposed road, is John Devan, who was a witness at the trial.

During the argument of the case, counsel for the defendants conceded that if the effect of the deed was to grant a right of way only, and not the land, the defendants would not have the right to cut the trees unless a further title had been acquired by her by length of possession. I think counsel was perfectly right in making this concession.

Then, what is the effect of these words in the conveyance from Hamilton to McIlroy and others. Did they operate as a conveyance of the land embraced in the strip forty feet wide, or only as a grant of a right of way?

In the American and English Encyclopædia of Law, vol. 21, p. 412, cases are referred to on the subject "Road" compared with "Way." One of these is *Kister v. Reesser*, 98 Penn. St. 1, in which it was held that where a clause in a deed conveying a tract of land "reserved" to the grantor a

road ten feet wide along the line of C. D., this constituted a reservation to the grantor of a right of way, and not an exception from the conveyance of a strip of land ten feet wide. Judgment.
Ferguson, J.

Mr. Justice Trunkey, in delivering the opinion of the Court, said, at p. 4: "The word 'road' has never been defined to mean 'land'; it is difficult to find a definition that does not include the sense of 'way,' though the latter word is more general, referring to many things besides roads."

In the case *Chollar Potosi Mining Co. v. Kennedy*, 3 Nevada 328, Chief Justice Beatty, at 337, delivering the opinion of the Court, strongly opposes the statement made by Shafter, J., in *Wood v. Truckee Turnpike Co.*, 24 Cal. 474, at p. 487, that "road" is a legal term strictly synonymous with the term "way."

In the case *Leavitt v. Towle*, 8 N. H. 96, the exception was of a road laid out through premises. The Court, citing *Peck v. Smith*, 1 Conn. 103 (called a leading case on the subject), held that a road was a right of passage merely, and the soil over which it passed would not be transferred by a conveyance of the road. Both these cases are referred to in *Munn v. Worrall*, 38 N. Y. 44, which, though not precisely in point, seems to proceed on the same principles.

In the case *Graves v. Amuskeag Manufacturing Co.*, 44 N. H. 462, Chief Justice Bell, after referring to a number of cases, concluded his judgment by saying, at p. 465: "These decisions settle the question that by a grant of a road from one place to another, of such a width, a right of way only passes, unless there is something in the terms of the conveyance indicating a different intention."

There are some expressions in some of the decisions going to shew that a grant of a road of a certain width from one place to another, though it conveyed only an easement, yet, if it appeared that the grantor owned only the land occupied by the road, the description might be sufficient to transfer the land: *Munn v. Worrell*, top of page 48.

After having examined a very considerable number of

Judgment. decisions by the Courts in the United States, I think I am
Ferguson, J. safe in saying that, although there have been some differences of opinion and contention on the subject, the great weight of authority in that country is to the effect that a conveyance of a "road" does not operate as a conveyance of land at all, but only as a grant of a right of way.

In Washburn on Easements, 4th ed., p. 48, the author, referring to some of the cases to which I have alluded, says: "The grant or reservation of a 'way' or 'road,' without other words of description, carries an easement only, and not the fee in the soil."

I do not see that any difference, as to the title to the freehold of the soil occupied by highways, between the law in this country and the law in many of the states of the United States, or in England, is at all material to what is being considered here.

It was contended that the words added to the description of the road forty feet wide, "and is not included in the above quantity of land," shew that the description of this strip is a description of the land, and that the freehold in the strip passed by the grant and not a mere right of way or easement.

I cannot take this view. The words themselves do not express what is contended for, and if one is at liberty to search for the intention of the parties to the deed, does it not immediately occur to the mind that if they had intended that this strip of land should pass by the conveyance, it would have been mentioned and described as land, as were the irregularly shaped parcels of land that were actually granted and conveyed by the same deed?

I was not referred to, nor have I found any cases in our own Courts or in England as to the meaning and effect of a grant and conveyance of a "road."

In such circumstances, the decisions in the Courts in the United States I think a very good guide. What I take to be the meaning and effect of these cases accords with what would have been my view without having seen any decisions on the subject.

After the best consideration I have been able to bestow Judgment.
upon the subject, I am of the opinion that the fee or free- Ferguson, J.
hold in this strip of land forty feet wide did not pass by
the deed from Hamilton to McIlroy and others, but only
an easement—a right of way—and this easement is all, in
respect of this strip of land, that came to the defendant
Frances Webster through the line of conveyances from
McIlroy down to her; and, assuming this to be so, the fee
and freehold in this strip of land did pass by the conveyance
of the 29th day of November, 1877, to Mr. Begue, for it is
admitted, as before stated, that the grantors in that deed
were the proper representatives of the estate of Hamilton.
This conveyance was subject to a right of way, “if any,”
at the place in question.

It is clear that the title that passed to Mr. Begue is now
vested in the plaintiff, unless the defendant Frances Webster
has acquired a title by length of possession in herself and
those through whom she claims, and, upon the evidence, I
think it idle to contend that this has taken place. However
strong the contention might be that she lost her title to the
right of way by length of possession in the plaintiff and those
through whom she claims and absence of user of such
right, it cannot, as I think, be made out upon the author-
ities, I may say in the face of the authorities, on the
subject and upon the slender evidence given, that the
defendant Frances Webster acquired any right or title to
the land by length of possession.

The plaintiff then is, as I think, shewn by the evidence,
the owner in fee of the land, the *locus in quo*, and the
highest and largest right the defendant Frances Webster
can, as I think, claim, is a title to the right of way.

The action is for a trespass. The cutting and removal
of the trees by the defendants are really the acts that are
complained of and in respect of which evidence of damages
was given.

On the concession of counsel for the defendants before
mentioned, which, I repeat, I think was right, the owner-
ship of the right of way, if it at the time existed, would

Judgment. not be ground of justification of the act of cutting down
Ferguson, J. and removing the plaintiff's trees, which, whether considered timber trees or ornamental trees, were part of the land of the plaintiff.

No declaration of right is specifically asked by the plaintiff, and, on the grounds stated above, the action of trespass can readily be determined. I think I am not called upon to determine, upon such evidence as there is, whether or not the defendant Frances Webster acquired the right to an easement, a foot-path on or over other parts of the plaintiff's property, or whether or not her title to the forty feet right of way or road became extinguished.

I am of the opinion that there should be judgment for the plaintiff in respect of the trespass committed by the defendants in cutting and removing the trees, and that the plaintiff should have an order restraining the defendants from committing like acts of trespass upon the forty feet strip of land. The learned Judge then assessed the damages.

G. F. H.

[COMMON PLEAS DIVISION.]

HOPKINS V. THE CORPORATION OF THE TOWN OF OWEN
SOUND ET AL.

Municipal Corporations—Private Approach to and from Highway—Non-repair—Accident—Liability of Private Person.

A person who, with the knowledge of, and without objection by, a municipal corporation, constructs across a ditch between the sidewalk and crown of the highway an approach therefrom to enable vehicles to pass to and from his property, adjacent to the highway, is liable for injuries sustained, through want of repair of the approach, by a person using it to cross the highway.

THIS was an action tried before FERGUSON, J., at the Statement.
jury sittings at Owen Sound, on the 14th September, 1895.

The facts fully appear in the judgment.

The following are the questions and answers submitted to and made by the jury:

1. Was the defendant negligent in not keeping the approach in good repair, assuming for the present that it was his duty to keep it in good repair? A. Yes.

2. Was the plaintiff guilty of contributory negligence in departing from the sidewalk and passing over the approach as she did or otherwise? A. No.

3. Could the plaintiff have avoided the accident by exercising reasonable diligence? A. No.

4. What amount of damages do you think the plaintiff entitled to? A. \$200.

H. G. Tucker, for the plaintiff.

Masson, Q.C., for the defendant Trotter.

Smith, for the defendants, the corporation of Owen Sound.

At the conclusion of the case, the learned Judge reserved his decision, and subsequently delivered the following judgment:

Judgment. October 16, 1895. FERGUSON, J.:—

Ferguson, J.

The action was originally brought against these two defendants, but, for some reason was discontinued or abandoned as against Owen Sound.*

The defendant Trotter is the proprietor of a house and lot in Owen Sound. The street in front of his premises is graded in such a manner that there is a ditch of considerable depth between the sidewalk and the crown of the grading of the street. Many years ago Trotter constructed with the knowledge of, and without objection by the corporation of Owen Sound, what is called "an approach" from the street as travelled by teams, etc., across the ditch to the sidewalk opposite his place. This was constructed for Trotter's own use as a way for himself and others to pass to and from his property. It was constructed with sleepers or stringers across the ditch which were covered with planks and used for driving horses, wagons and carriages to and from Trotter's place, and had, long before the present difficulty arose, been repaired by Trotter. There was no contract or agreement between Trotter and the corporation as to the construction, maintenance or repair of this approach. The corporation simply knew of it, and did not, at any time, object to it or its existence. The plaintiff was passing on foot along the sidewalk in front of Trotter's place, desiring and intending to go to a house on the opposite side of the street, but farther on in the direction in which she was going. She could have gone on to the next corner and crossed the street upon a good crossing, and returned on the opposite side of the street to the place of her intended destination. She, however, attempted to adopt a shorter way by taking a diagonal or oblique course across the street, and for this purpose departed from

* The reason of the action being discontinued against the corporation was that it had not been commenced within the three months required by the Municipal Act, though at the time the action was commenced, it was thought that the plaintiff would be able to prove misfeasance on the part of the corporation, but which, at the trial, he found he was unable to do.

the sidewalk and went upon the "approach" in question, ^{Judgment.} which there was evidence going to shew, had become ^{Ferguson, J.} dilapidated and out of repair. It being in the night time, the plaintiff's foot passed through a hole in this approach, and in consequence, her leg was broken. She suffered a severe injury.

At the close of the plaintiff's case, defendant's counsel moved for a nonsuit, stating several grounds, all of which, so far as necessary for present purposes, may be summed up into the one, that the defendant Trotter was not, in the circumstances, obliged to keep, or that no duty rested upon him, so far as the plaintiff had concern, to keep the approach in repair.

On this motion for a nonsuit, I reserved judgment. The case was submitted to the jury, it having been for the then purposes, assumed that it was the duty of the defendant Trotter to keep the approach in repair. The jury were asked to answer several questions which they did. The questions and answers are attached to the Record. The answers are plainly in favour of the plaintiff, and the damages are assessed at the sum of \$200, which I cannot but think a small sum.

What I have now to say is whether or not in the circumstances, it was the duty of the defendant Trotter to keep the approach in repair.

I have looked at a very considerable number of cases without being able to say that I have found a case precisely in point. Yet I am confirmed in the view upon the subject that I entertained at the time of the trial, which seems fairly well expressed by a learned Judge in the case *Weller v. McCormack*, 47 New Jersey L. R., 397, at p. 398. He said: "It must be conceded that ordinarily, when a person for his private ends, places or maintains, in or near a highway, anything which, if neglected, will render the way unsafe for travel, he is bound to exercise care to prevent its becoming dangerous."

The plaintiff was travelling upon the highway as she lawfully might.

Judgment. I am of the opinion that the defendant Trotter having constructed this approach as he did, had a duty resting upon him to keep it in repair, and my judgment on the motion for the nonsuit is against the defendant.

Ferguson, J.

Then, upon the answers of the jury, a verdict must be entered for the plaintiff and against the defendant Trotter, for the sum of \$200, and I think the plaintiff should have the costs of the action according to the higher scale.

G. F. H.

[QUEEN'S BENCH DIVISION.]

HENDRIE

V.

THE TORONTO, HAMILTON AND BUFFALO R. W. CO.

Railways—Lands Injuriouly Affected—Right to Compensation.

Statement.

IN this action the defendants appealed from the judgment of MEREDITH, C. J., at the trial, following his judgment reported in 26 O. R. 667, and the appeal was argued before the Queen's Bench Divisional Court, composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on November 28, 1895.

McCarthy, Q. C., and D'Arcy Tate, for the appeal.

Robinson, Q. C., and Bruce, Q. C., contra.

The judgment of the Court was delivered on December 14, 1895, by STREET, J., affirming the judgment of Meredith, C. J., appealed from, declaring the plaintiff entitled to compensation; and the appeal was dismissed with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

IN RE BABCOCK V. AYERS.

Division Courts—Jurisdiction.—Prohibition—Promissory Note Payable by Instalments.

An action for the first instalment due on a promissory note for \$400, payable in three annual instalments, is for an amount ascertained by the signature of the defendant, and may be brought in a Division Court before the maturity of the second instalment.

“In three annual instalments” in such a note means equal instalments. Prohibition refused.

THIS was a motion for prohibition to the Sixth Division Statement.
Court of Halton, against enforcing a judgment obtained there against the defendant on November 1st, 1887, upon the ground that the claim was beyond the jurisdiction of the Division Court.

The action was brought for the first instalment upon a promissory note, made in the following words by the defendant :

“BURLINGTON, Sept. 21st, 1885.

“\$400. Received from Wm. E. Babcock the sum of four hundred dollars, which we promise to pay him or his order, as follows : in three annual instalments with interest at 6 per cent. per annum for value received.

“(Signed) ALLAN AYERS.”

The defendant was not personally served with the summons, but it was served together with an attachment against him as an absconding debtor in October, 1887, and judgment was obtained on November 1st, 1887, by default.

The Division Court summons, it was admitted, was issued before September 21st, 1887, and in it the plaintiff claimed “\$133.33 with interest from September 24th, 1886, on \$400, being the first instalment” upon the note above set forth.

The defendant upon the present application, swore that he only became aware of the recovery of the judgment a few days before the application was launched, and that he never owed the money.

Statement. The prohibition was applied for upon the ground that the amount sued for was not ascertained by the signature of the party, and was, therefore, beyond the jurisdiction of the Court.

The motion was argued on November 18th, 1895, before STREET, J.

A. McLean Macdonell, for the motion.
Raney, for the plaintiff, contra.

November 19th, 1895. STREET, J. :—

In my opinion, a promise to pay a sum in "three annual instalments," is equivalent to "three equal annual instalments;" and the instrument produced is a promissory note payable by instalments, upon each of which an action will lie at its maturity. Each of these instalments was, therefore, for an ascertained amount, viz, one-third of \$400, and was ascertained by the signature of the party, and was payable in one, two, or three years from the date of the note.

I am unable to find any ground upon which prohibition should be granted, as it was conceded by the defendant's counsel, that the action was before the second instalment became due.

The motion must be dismissed with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

THE ATTORNEY-GENERAL FOR ONTARIO V. THE HAMILTON
STREET RAILWAY CO.*Sunday—Street Railways—Lord's Day Act, R. S. O. ch. 203, sec. 1—
Construction—Exception.*

The words "or other person whatsoever" in sec. 1 of the Lord's Day Act, R. S. O. ch. 203, are to be construed as referring to persons *ejusdem generis* as the persons named, "merchant, tradesman," etc.; and an incorporated company or person operating street cars on Sunday is not within the prohibition of the enactment.

Sandiman v. Breach, 7 B. & C. 96; *Regina v. Budway*, 8 C. L. T. Occ. N. 269; and *Regina v. Somers*, 24 O. R. 244, followed.

Semble, also, that the defendants, if the enactment applied, were within the exception as to "conveying travellers."

Regina v. Daggett, 1 O. R. 537, followed.

Regina v. Tinning, 11 U. C. R. 636, not followed.

THIS action was brought, upon the information of one Statement.
John Henderson, for an injunction to restrain the defendants from operating their electric cars upon Sundays.

The facts are stated in the judgment.

The action was tried by ROSE, J., without a jury.

The evidence was taken at Hamilton on the 14th November, 1895, and the argument heard at Toronto on the 27th December, 1895.

Moss, Q. C., and *A. E. O'Meara*, for the plaintiff.

Edward Martin, Q. C., and *Kirwan Martin*, for the defendants.

December 31, 1895. ROSE, J. :—

It was conceded that the defendant company had the right to run its cars on Sunday as well as on the other days of the week, unless doing so was a violation of the provisions of R. S. O. ch. 203, an Act to prevent the Profanation of the Lord's Day, sometimes called the Lord's Day Act.*

*R. S. O. ch. 203, sec. 1.—It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever on the Lord's Day, to sell or publicly shew forth, or expose, or offer for

Judgment.

Rose, J.

The following questions then arise: (1) Does the above statute apply to the defendant company?

(2) If so, is what was shewn to have been done here within the exception as being a conveying of travellers?

(3) If not within the exception, was it necessary, to entitle the plaintiff to succeed, for him to shew substantial injury to the public?

(4) If necessary, has such injury been shewn?

(5) And, in any view, on this evidence, is an order of injunction the proper remedy for any violation of the Act?

The statute does not apply to the company unless it is one of the persons named in the first section of the Act, or a person *ejusdem generis* with those named.

I assume that the fact that the defendant is a corporation does not prevent the Act applying.

The persons named in the Act, are "merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever."

It is not open, on the decisions in our own Courts, for the plaintiff to contend that the words "or other person whatsoever" are not to be construed to refer to persons *ejusdem generis*: see *Regina v. Tinning*, 11 U. C. R. 636; *Hespeler v. Shaw*, 16 U. C. R. 104; *Regina v. Budway*, 8 C. L. T. Occ. N. 269; *Regina v. Somers*, 24 O. R. 244.

Therefore, we have to see if a person running street cars is one named by the statute, or *ejusdem generis* with such person.

This question, also, is, as it seems to me, practically concluded by authority.

In *Sandiman v. Breach*, 7 B. & C. 96, it was held by the Court, the judgment being delivered by Lord Tenterden, C. J., that the words "or other person or persons

sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's Mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted).

whatsoever," in the 29 Car. II. ch. 7, sec. 1, were not used in a sense large enough to include the owner or driver of a stage coach. That section provided "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings on the Lord's Day," etc.

Judgment.
Rose, J.

In *Regina v. Budway, supra*, it was held by the full Court (Queen's Bench Division) that a cab-driver did not come within the words of chapter 203; and in *Regina v. Somers, supra*, the same Court followed its decision in *Regina v. Budway*.

In the latter case the fact stated was that "the defendant was a servant of one Charles Brown, a keeper of a livery stable in the city of Toronto, and on the day in question, drove a cab belonging to Brown through the streets of the city, for hire."

Mr. Moss urged that the two latter decisions should be confined to the facts then before the Court, and did not apply to a case of a cab-driver who was both owner and driver. It seems to me there is, in principle, no distinction between the driver who is the owner, and the driver who is the servant of the owner, that would apply in favour of the servant; indeed, it might be contended that a servant who was not the owner would more readily come within the description "workman or labourer," than would the owner who was also the driver; and in *Sandiman v. Breach*, as we have seen, Lord Tenterden draws no such distinction, but uses the words "owner or driver." Then, if an owner or driver of a stage coach, or an owner or driver of a cab, is not within the Act, is one who is an owner or driver of a street car, whether such car is moved by horses, steam, electricity, or other motive power? I am unable to see any distinction between such persons. I think there is none; and, following the above decisions, which are binding upon me, I must hold that the defendant company is not within the Act, and so not prohibited from running its cars on Sunday.

Judgment.

Rose, J.

But, assuming that the Act does apply, then has it been shewn that the company was or was not "conveying travellers?"

The exception is in the following words: "Conveying travellers or Her Majesty's Mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted."

In *Regina v. Daggett*, 1 O. R. 537, the full Court (Queen's Bench Division), composed of Hagarty, C. J., and Armour and Cameron, JJ., held that excursionists, leaving Buffalo, in the State of New York, on a Sunday morning, and proceeding by rail to Niagara, thence by defendant's steamboat to Toronto, and back the same day, were travellers within the exception, and that there is no distinction in such a case between travellers for pleasure and for business. The decisions under the 29 Car. II. ch. 7 were collected and referred to and accepted as defining the term "travellers" as used in our statute.

There the learned Chief Justice said: "It matters nothing, in my judgment, whether they travel wholly for pleasure, fresh air, relaxation from work, or with or without luggage, or actually on important business—they are travellers within the meaning of the statute. To draw any distinction between persons according to the purpose which induced them to travel would, as it seems to me, be a vain attempt, leading to impossible and irritating inquiries, and tending to bring a useful and salutary enactment into contempt."

No effect was given to the argument of counsel that "conveying travellers," to be within the exception, must be a work of necessity, the Court evidently holding otherwise.

Among the cases referred to decided in England under the 29 Car. II. was *Peplow v. Richardson*, L. R. 4 C. P. 168, where it was held that a man who walked two and a-half miles from his residence to drink mineral water at a spa, was a traveller; and in *Taylor v. Humphries*, 10 C. B. N. S. 429, Erle, C. J., held that persons who had walked

four miles, on business or pleasure, might be lawfully supplied with refreshment as travellers.

Judgment.

Ross, J.

Mr. Moss endeavoured to distinguish these cases on the ground that the persons had walked to a distance out of the town where they resided, but I find no such distinction suggested, and it seems to me to be fanciful and not entitled to prevail. It is also manifest that the distance passed over does not determine whether one is a traveller or not.

In *Regina v. Daggett*, *Regina v. Tinning*, 11 U. C. R. 636, was referred to and not followed. It was declared to be not in accordance with the subsequent decisions.

In *Regina v. Tinning*, the Court held "that persons making it their ordinary business to ply within the harbours of a town, not for any purpose of carrying travellers or the mail, were intended to be restrained by the Act," adding, "We think it clear that the persons carried on a Sunday between the city (Toronto) and the peninsula cannot be called travellers within the meaning of the exception. They are persons notoriously seeking more recreation."

I must follow *Regina v. Daggett* in preference to *Regina v. Tinning*, leaving an appellate tribunal to say that the later decision is wrong, if it is so, for it—*Regina v. Daggett*—is founded upon decisions subsequent to *Regina v. Tinning*, and has remained unquestioned since it was decided in 1882.

Both decisions are of the same Court, differently constituted, and the later decision is, as I think, a declaration that the former is not good law, and is a declaration of the law which binds me sitting as a Judge of first instance.

It was pointed out that the Legislature by the 48 Vict. ch. 44, secs. 1-7 (now sec. 7 of R. S. O. ch. 203), had declared excursionists not to be travellers; but it will be observed that such section applies only to persons going and returning on the same day, by the same steamboat or railway, or any other owned by the same persons or company, such steamboat or railway having for the only or principal object the carriage of Sunday passengers for

Judgment.**Rose, J.**

amusement or pleasure only, and does not apply to persons carried one way only, or going and returning on different days. So the construction put upon the word "travellers" by the Court in *Regina v. Daggett* stands with the above exception.

It is instructive to note the care the Legislature exercised in declaring the limitations to such extension of the Act.

I find as a fact that the defendant company has not been shewn to have run its cars having for the principal or only object the carriage of Sunday passengers for amusement or pleasure only, and there is no evidence before me on which I could find that the company carried what might be called Sunday excursionists.

I find as a fact that the cars of the defendant company were shewn to have been run on Sunday as on other days, only less frequently, for the carriage of travellers at the usual rates of fare, and, although it may be that persons who were not travellers were carried, such fact was not shewn. It having been decided that to go two and a-half miles to drink mineral waters; to walk out for fresh air or pleasure, say three or four miles; to go upon an excursion from Buffalo to Toronto and return; or to go over to the peninsula (now island) opposite Toronto for recreation, constituted the person so journeying a traveller, I must either ignore the effect of such decisions, or hold that at least certain persons carried by the defendant company were travellers within the meaning of the Act, *e.g.*, persons who, coming into the city by the ordinary railway trains, desired to reach their respective destinations in the city; persons going to and returning from church; persons going to places of rest or recreation; and the like.

It follows from the view I have taken of the decisions referred to, that the company had the right to run its cars for the purpose of "conveying travellers," and, so running, the cars would create all the noise and disturbance that they are alleged to create, to the annoyance of some of the persons who gave evidence at the trial, without regard

to whether they did or did not carry persons who were not travellers, and so I cannot find that, by carrying persons who were not travellers, they have created or continued a nuisance; and, therefore, there is no ground on which the Court can interfere.

Judgment.

Rose, J.

For the information of the Court, if this case is carried farther, and it shall become necessary to find any facts upon the evidence not found by me, I desire to say that, as far as I could judge, the several witnesses at the trial were apparently honest in their endeavour to tell the truth. Their opinions as to the running of the cars on Sunday being an annoyance seemed to be affected by their views as to whether it was morally right or wrong so to run them, and such views were again influenced to some extent by the fact that the running of the cars on Sunday was or was not to them or the churches or congregations to which they belonged, a benefit, advantage, or convenience.

I was referred by Mr. Martin to ch. 99 of the 35 Vict. (O.), incorporating the Toronto Railway Company, and confirming the agreement therein set out. By clause 1 of that Act the company is permitted to run its cars on Sunday, when agreed to by the citizens, provided that so doing is not a contravention of the Lord's Day Act. This probably shews that the Legislature had formed no opinion that the Lord's Day Act did clearly prohibit the running of cars on Sunday.

I was referred to the case of *The Attorney-General v. Niagara Falls, etc., Tramway Co.*, 19 O. R. 624 and 18 A. R. 453, but that case did not turn upon any question under chapter 203 above considered.

On the whole, I am of the opinion that the plaintiff's case fails, and the action must be dismissed with costs.

E. B. B.

[CHANCERY DIVISION.]

PATTERSON ET AL. V. KING ET AL.

Landlord and Tenant—Right to Distrain—Garnishment of Rent—Suspension of Right to Distrain—Apportionment of Rent—R. S. O. ch. 143, secs. 2-6.

A landlord's right to distrain is suspended as to that portion of the rent which has accrued up to the garnishment, by the service on the tenant, before such distress, of an order attaching the rent, and distress for such portion is wrongful.

Statement. THIS was an action for trespass and wrongful distress, and for an injunction. The plaintiff John Patterson was tenant of a house belonging to J. A. McIlwain, one of the defendants. His co-plaintiff was a lodger in the house. The defendant King was mortgagee of the premises, and, as the plaintiff alleged, had, with the landlord McIlwain, wrongfully distrained the goods of the plaintiffs as for rent due, after such rents had been attached in an action in the High Court of Justice, by one Margaret Parker, judgment creditor of McIlwain. A portion of the rent distrained for, namely, twelve days' rent, accrued due after the service of the attaching order, but as to this the plaintiff alleged a sufficient tender, after which the landlord, nevertheless, retained the goods for several days.

The case was tried on November 24th and 25th, 1895, before BOYD, C., at the Assizes at Toronto.

J. E. Cook, for the plaintiff. There was no right to distrain for a fraction of the rent; tender was made as to the twelve days' rent and costs, and was refused; the distress was, moreover, irregular: *Towerson v. Jackson*, [1891] 2 Q. B. 484; *Underhay v. Read*, 20 Q. B. D. 209; *Massie v. Toronto Printing Co.*, 12 P. R. 12; *Kinnear v. Aspden*, 19 A. R. 468; *Hickman v. Machin*, 4 H. & N. 716; *Edmundson v. Hamilton Provident and Loan Society*, 19 O. R. 677; *Howell v. The Listowell Rink and Park Co.*, 13

O. R. 476, 494; *Bayliss v. Fisher*, 7 Bing. 153; R. S. O. Argument. ch. 143, sec. 44; *Keen v. Priest*, 4 H. & N. 235.

Neville, for the defendants King and McIlwain. The right of distress was not gone, nor was it suspended by the attaching order.

Defendant, L. J. Williams, in person.

Cook, in reply: *Mitchell v. Lee*, L. R. 2 Q. B. 259; *Sparks v. Younge*, 8 Ir. C. L. R. 251.

December 4th, 1895. BOYD, C. :—

Rent may be attached, and when it is attached the legal result is that the collateral remedy of the landlord (*i.e.*, the judgment debtor), by way of distress is suspended. That is said in so many words by Blackburn, J., in *Mitchell v. Lee*, L. R. 2 Q. B., at p. 263, and it is my duty to act upon that view of the law in the present case.

I may note that *Mitchell v. Lee* is more fully reported in 8 B. & S. 92, where, during the argument, Blackburn, J., observes: "The debt (*i.e.*, for rent) is not transferred but is bound in the hands of the garnishee, and while bound, the landlord's right to distrain, is suspended," and with that Cockburn, C. J., agrees, saying: "The extraordinary remedy by distress is suspended, and to that extent the landlord is damnified. The difficulty in my mind is how the landlord can enforce his rights while the attachment lasts," at p. 94. Then the disadvantages of allowing attachment to supersede the right to distrain are pointed out at p. 96; but yet the Court in its judgment affirms that the landlord cannot avail himself of the power of distraining while the debt is attached under the garnishment clauses of the statutes.

The result is that the distress was wrongful, because for a much larger sum than could be distrained for.

This arises from the power to attach a part of the rent as it accrues due *de die in diem*, though it is not actually payable till the next gale day. Such a severance of rent is by means of the Act relating to the apportionment

Judgment. of rent: R. S. O. ch. 143, secs. 2-6; *Kinnear v. Aspden*, 19 A. R. 468, 475; and *Massie v. Toronto Printing Co.*, 12 P. R. 12.

The rent accrued up to the day of attachment is intercepted by the service of the garnishing order, and to that extent no distress can be made while it stands: *In re Wilson*, 10 Mor. B. C. 219, 227.*

As to the fraction of rent, twelve days, which might be distrained for, there was a sufficient tender in regard to that which displaced the right of the landlord to hold the goods any longer therefor.

But he did hold for some days, and did put the tenant to considerable discomfort, though he ultimately withdrew from possession and otherwise so conducted himself as to leave the tenant in undisturbed enjoyment of the property. If I award thirty dollars damages and costs of all the proceedings for injunction, I think ample justice will be done.

This should be the measure of recovery against the landlord McIlwain and his bailiff.

I do not think I should extend it to Mrs. King, though I think she so acted in the matter of the distress as to disentitle her to any costs, although I dismiss her from the action.

The money in Court may be paid out to the attaching creditor if his contention is sustained in the Court of Appeal.

A. H. F. L.

*See, also, S. C. 5 R. 455.

[COMMON PLEAS DIVISION.]

REGINA V. COULSON.

Medical Practitioner—Justice of the Peace—Summary Conviction—Certiorari—Evidence—Practising Medicine—Ontario Medical Act, R. S. O. ch. 148, sec. 45.

When a summary conviction is removed by *certiorari* and a motion made to quash it, it is the duty of the Court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, to see if there is any evidence whatever shewing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but if there is any evidence at all, it is not the province of the Court to review it as upon an appeal.

Regina v. Coulson, 24 O. R. 246, not followed.

The defendant was convicted under the Ontario Medical Act, R. S. O. ch. 148, sec. 45, for practising medicine for hire. The evidence shewed that when the complainant went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicine, after learning the symptoms; and that, upon the advice of the defendant, he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon:—

Held, that there was evidence to support the conviction.

Regina v. Coulson, 24 O. R. 246, distinguished.

Regina v. Howarth, *ib.* 561, followed.

MOTION to make absolute a rule *nisi* to quash a summary conviction of the defendant by the police magistrate for the city of Toronto, for that he, the defendant, not being registered, did for hire or reward practise medicine by prescribing for and treating Samuel Hughes, contrary to the statute, etc. Statement.

R. S. O. ch. 148, sec. 45.—It shall not be lawful for any person not registered to practice medicine, surgery, or midwifery for hire, gain, or hope of reward. * *

The motion was argued before MEREDITH, C. J., and ROSE, J., on the 25th November, 1895.

Aylesworth, Q. C., for the defendant, cited *Regina v. Coulson*, 24 O. R. 246; *Regina v. Howarth*, *ib.* 561, 567; *Regina v. Stewart*, 17 O. R. 4.

L. G. McCarthy, for the complainant.

Judgment. January 11, 1896. ROSE, J. :—

Rose, J.

I do not see how it is possible for us to interfere. There certainly was evidence upon which a conviction might well be founded.

The witness Hughes said that when he went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicine after learning the symptoms; and that upon the advice of the defendant he took his medicine, went under treatment, paying the fee agreed upon.

On cross-examination the witness answered as follows:

What medicine did you eventually decide to take? A. Whichever he gave me, whichever he thought best for me.

To the Court. Q. You didn't choose it yourself? A. No.

You left it to him, after hearing your symptoms, to pick out the medicine? A. Yes. * * *

Tell me what took place the second time you saw Mr. Coulson? A. I decided to take the medicine and come again for it.

What medicine did you decide to take? A. Whatever medicine he was going to give me.

What was he going to give you? A. I didn't know what he was going to give me.

Why? Wasn't it decided? A. Well, I didn't know what the treatment was.

The witness went to see the defendant a fourth time to get "other medicine," and the fifth time he went he told the defendant he was very costive, and he got from the defendant "some pills for the bowels."

You didn't get anything? A. Yes, I got some pills for the bowels.

What did you ask for? A. I didn't ask for anything in particular.

When we remember that the treatment was to extend over some months, according to the contract, it is manifest that it required an exercise of judgment and skill to

determine the length of time required to treat the disease, the nature of the medicine which should be administered, and the quantity to be taken. This could be decided only after knowledge of the symptoms, and determining the disease, its stage of advancement, and probable effect of the medicine upon the system.

Judgment.

Rose, J.

The defendant clearly was not, on such evidence, vending a proprietary medicine; he was diagnosing and treating disease; he was practising medicine.

I do not desire to repeat, and so refer to what I said in *Regina v. Howarth*, 24 O. R. 561, and especially p. 567.

Mr. Aylesworth pressed upon us the decision in *Regina v. Coulson* (the same defendant), 24 O. R. 246, where what was there shewn was held not to be practising medicine.

The Court in that case (Queen's Bench Division), contrary to the opinion held by this Court, did not look at the evidence until it appeared that the conviction was bad on its face, and then looked at it, not to see if there was any evidence, but to see if an offence was committed, and, so looking at it, held that "looking at *all* the evidence," they could not "come to the conclusion that an offence was committed of the nature specified in the conviction," adding, "we cannot hold that what the defendant did on the occasion in question was practising medicine within the meaning of the statute." And the evidence there was open to such a conclusion if effect was given to the defendant's testimony, while the evidence for the prosecution was very meagre, and not satisfactory. The only statement of the complainant on which a holding adverse to the defendant could have been founded, was as follows: "He asked me what was the matter with me, * * he asked me what my symptoms were, and he said I should take treatment '8 c.'"; while on cross-examination he said, "I told defendant that I had the gleet. He said my disease came under treatment '8 c.'" The defendant denied prescribing for the complainant, and said, "He asked me for a package of our '8 c.' treatment, and said

Judgment. he could not pay the full amount, but I agreed to give him credit for part of it.”
Rose, J.

We think it our duty to look at the evidence taken by the magistrate to see if there was any whatever shewing an offence ; if none, then it is our duty (in our opinion) to quash the conviction, as made without jurisdiction, but if there was any, then not to interfere, as it is not our province to review the evidence as on an appeal.

So looking at the evidence, we think there was some evidence (and, in my opinion, sufficient, if we were entitled to review it) to sustain the finding of the magistrate.

The conviction must stand, and the motion be dismissed with costs.

MEREDITH, C. J., concurred.

E. B. B.

[COMMON PLEAS DIVISION.]

REGINA V. CRANDALL.

Game—Justice of the Peace—Summary Conviction—Permitting Deer Hounds to Run at Large—56 Vict. (O.) ch. 49, sec. 2, sub-sec. (2)—Scienter—Evidence—Amendment—Criminal Code, sec. 889—Costs.

A summary conviction of the owner of a hound or other dog for permitting "such hound or dog to run at large in any locality where deer are usually found," contrary to the provisions of the Ontario Game Protection Act, is bad unless it states that the dog was "known by the defendant to be accustomed to pursue deer;" and cannot be amended under sec. 889 of the Criminal Code unless the evidence shews knowledge of the owner of such habit of the dog. A statement in a deposition that "dogs were at large on defendant's premises" is not evidence that they were either running or permitted to run at large contrary to the statute.

Costs withheld, as the *bona fides* of the magistrate had been unsuccessfully attacked.

ON November 25, 1895, *Aylesworth*, Q.C., moved absolute Argument.
a rule *nisi* to quash a summary conviction of the defendant for allowing deer hounds to run at large, before MEREDITH, C.J., and ROSE, J.

J. R. Cartwright, Q.C., shewed cause.

The facts are stated in the judgment.

January 11, 1896. ROSE, J.:—

The words of the statute are as follows: "No owner of any hound or other dog, known by the owner to be accustomed to pursue deer, shall permit any such hound or other dog to run at large in any locality where deer are usually found:" 56 Vict. (O.) ch. 49, sec. 2, sub-sec. (2).

The evidence was as follows: "Saw Fremont Crandall's deer dogs at large on defendant's premises in the vicinity where deer are known to inhabit, on or about the 22nd day of September."

The conviction was, "for that he, the said Fremont Crandall, on or about the 22nd of September, A.D. 1894, did allow his deer hounds to run at large in a locality

Judgment. where deer are usually found, contrary to the statute in that behalf," etc.
Rose, J.

It is manifest that the conviction does not set out an offence in the words of the statute, for it is not said that the dogs were "known by the owner (the defendant) to be accustomed to pursue deer."

It becomes necessary, therefore, to peruse the depositions to see if, upon such perusal, we are "satisfied that an offence of the nature described in the conviction * * has been committed:" sec. 889, Criminal Code.

I am not satisfied on the evidence that the dogs were known by the defendant to be accustomed to pursue deer. It would be intending much against the defendant to say, because he owned "deer dogs," that such dogs were accustomed to pursue deer, and that he knew it. The dogs might have been very young (it is said that at least two of the dogs were puppies), and, for that or some other reason, might never have pursued a deer. The statute does not say that if the dogs are of a breed accustomed to pursue deer, the knowledge of the owner must be presumed; but, in my opinion, the statute requires the prosecution to establish the facts that the particular dogs were accustomed to pursue deer, and that the owner knew it. "Accustomed" is defined, "to be used or habituated:" Standard Dictionary (1894): and there is no evidence of any use or habit in this case.

Nor am I satisfied that the dogs were permitted "to run at large." The statement that they were "at large on defendant's premises" is no evidence that they were running at large, or that they were permitted to run at large. It would be a serious matter to hold that the mere statement that a man had hounds at large (whatever that may mean) on his premises, was sufficient to shew that he permitted them to run at large. *Non constat* that the premises were not small in area and well enclosed, or that for some other reason the dogs were not well under control.

In *Ibbottson v. Henry*, 8 O. R. 625, it was held that sheep grazing upon an open common, with the consent of

the owner thereof, and being herded by a boy in charge of them with a view to driving them home, were not "running at large" in contravention of a by-law of the municipality. The fact that the land was unfenced was not, in the opinion of Wilson, C.J., sufficient to give rise to an honest belief that they were running at large. See also American & English Encyclopædia of Law, vol. 12, p. 898, for a collection of cases on the point.

Judgment.
Rose, J.

Whether the statement that the dogs were "at large on defendant's premises" would have been sufficient to prevent the Court saying that there was no evidence to support the conviction, it is not necessary to determine or consider, for in this case we have to be satisfied that the offence has been committed, and such a bare statement does not satisfy my mind that that element of wrong-doing has been proven.

There was an attack upon the *bona fides* of the magistrate and private prosecutor, which has failed, and, although the magistrate's withdrawing to consult with the prosecutor, under the circumstances, was likely to give rise to suspicion, yet as the conduct has been explained, we think, on the whole, that while the conviction must be quashed, it should be without costs and with the usual order of protection.

MEREDITH, C.J., concurred.

E. B. B.

[CHANCERY DIVISION.]

FERGUSON V. TOWNSHIP OF SOUTHWOLD ET AL.

Municipal Corporations—Negligence—Way—Want of Repair—Overhead Obstruction—Liability—Finding of Jury—Contributory Negligence—Damages.

Anything which exists or is allowed to remain above a highway, interfering with its ordinary and reasonable use, constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway.

A branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at a height of about eleven feet. The plaintiff, in endeavouring to pass under the branch, on the top of a load of hay, was brushed off by it and injured :—

Held, that the jury having found that the highway was out of repair, the defendants were liable.

Embler v. Town of Walkill, 57 Hun 384, specially referred to.

The question whether a highway is out of repair is a question for the jury.

Derochie v. Town of Cornwall, 21 A. R. 279, followed.

It appeared by the evidence that the plaintiff had hauled hay upon this road and past this particular place not long before ; that he and another man who was on the load with him, when approaching the branch, observed the situation, but concluded they could pass in safety ; that the other man did pass safely under the branch, and the plaintiff, instead of lying close to the hay, put up his feet to raise the limb, which he failed to do :—

Held, that the plaintiff was not called upon to do the very best and wisest thing ; and upon this evidence the Court could not interfere with the finding of the jury that the accident might not have been avoided by the exercise of reasonable care on the part of the plaintiff.

Connell v. Town of Prescott, 22 S. C. R. at pp. 162-3, referred to.

Held, also, upon the evidence, that the sum assessed as damages, \$1,200, was not so excessive as to warrant the Court in interfering.

Statement.

THIS was an action brought against the municipal corporations of the townships of Southwold and Yarmouth by one Ferguson, who was injured by a fall from a load of hay upon a highway, said to be the substituted line between the two townships, to recover damages for the negligence of the defendants, or one of them, in permitting the highway to be and continue out of repair, which, as the plaintiff alleged, was the cause of his fall. The want of repair complained of was the permitting of a branch of a beech tree growing on the side of the highway to extend and remain over the *via trita* so as to obstruct the way or be dangerous to the travelling public. The facts are fully stated in the judgment.

The action was tried before MEREDITH, C. J., and a jury Statement. at St. Thomas. The jury, in reply to questions, which are set out in the judgment of FERGUSON, J., found in favour of the plaintiff, and assessed his damages at \$1,200, for which amount judgment was ordered to be entered.

The defendants moved to set aside the findings of the jury and the judgment for the plaintiff and to dismiss the action, or reduce the damages, or for a new trial.

The motion was argued before a Divisional Court composed of FERGUSON, ROBERTSON, and MEREDITH, JJ., on the 3rd June, 1895.

Osler, Q. C., and *James A. McLean*, for the defendants. The plaintiff knew the tree and place well, and had often passed there upon a load of hay. It is doubtful on the medical evidence whether he was really injured. It was not negligence in the defendants to leave the tree where it was; it was an original forest tree. The limb was as high as a barn door, or the passage into a hotel shed. But, even if it was negligent to leave the tree there, that was not the cause of the accident; it was caused, or at least contributed to, by the plaintiff's own negligence in approaching it, knowing the danger, and also in putting his feet up as he did; if he had not done so, he would have escaped, as did the other man on the load. Under these circumstances, the defendants cannot be liable. The damages are, at all events, excessive.

J. M. Glenn, for the plaintiff. The jury found, in effect, that the limb was too low and not safe. The evidence does not shew that the load was extraordinarily high. The defendants are liable for an overhead obstruction: *Embler v. Town of Wallkill*, 57 Hun 384, a case on all fours with this. The case was properly left to the jury, and it was for them to pass upon the questions of negligence, contributory negligence, and damages: *Connell v. Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147; *Derochie v. Town of Cornwall*, 21 A. R. 279.

Argument. *Osler*, in reply. The American case cited was decided under a special statute, and there was no contributory negligence alleged.

December 5, 1895. FERGUSON, J.:—

The action is for negligence in the alleged non-repair of a highway said to be within the jurisdiction of the defendants, or one of them, by reason of which the plaintiff, as is alleged, sustained serious injuries. The defendants are the municipal corporations of the townships of Southwold and Yarmouth respectively, and certain questions embracing the differences between these defendants in regard to which of them is liable, if there is a liability to the plaintiff, or whether, in such case, both the defendants are jointly liable, indeed, as I understand, all differences between the defendants, by agreement stand over to be investigated and adjudicated upon after the final determination of this action, so that with these questions or differences we have here no concern.

The verdict and the judgment directed to be entered are against both defendants, and the question here is whether or not this verdict should be permitted to stand, no attention being paid to any differences between the defendants; in short, if the plaintiff is entitled to hold the verdict as against either of the defendants, or as against both the defendants, the present verdict is to stand, and, as it appears it was agreed, the plaintiff is not to be delayed in his proceedings by any contentions between the defendants.

The question then is, should the verdict in these circumstances stand, or should it be set aside?

The alleged negligence complained of is the permitting of a limb or branch of a beech tree growing on the side of the public highway or allowance for a road to extend and remain over the line of travel upon the road so as to obstruct the way or be dangerous to the travelling public.

The height of this limb or branch above the road-bed or

track of travel was, according to the evidence, eleven feet or thereabouts. The plaintiff was riding upon a load of hay that he had purchased from the witness Casey, and Casey was driving the team, he being also upon the load. From the evidence one would say that this load consisted of one ton of hay or thereabout. The team and load were driven upon the road under this projecting limb or branch, by which the plaintiff was rubbed or brushed off the load, he falling to the ground, and, as is alleged, was very seriously injured. It appears that the binder-pole made a depression in or near the centre line of the load from front to rear; that Casey was at one side of this depression and the plaintiff at the other; that the top of the load from one side to the other was about on a level; and yet that Casey was not brushed off, while the plaintiff was. It also appears that the plaintiff had travelled and hauled hay upon this road, and at and past this place before, and at no very long period before this occurrence.

Judgment.

Ferguson, J.

The defendants set up and relied upon what is well known by the expression "contributory negligence," as well as their denial of negligence on their part, or that the road was not in repair as it should be. It was not questioned that the plaintiff was rightly, lawfully, and properly using the road, although, as before stated, contributory negligence of the plaintiff and of Casey, the one driving the team, was set up and relied on.

It was not denied that the road was a highway, and a road that should have been kept in repair by the proper municipal corporation or corporations, which, in the circumstances, would be one or other or both the defendants.

The tree and the limb or branch that occasioned the mischief had, of course, been a long time there, and the question of notice to the proper corporation was not much discussed. It appears to have been assumed that such notice should be presumed.

It was said that the road-bed was not in proper repair, but this does not seem to have been much discussed or relied upon.

Judgment.
Ferguson, J.

Questions were submitted to the jury, and after a very comprehensive, and, as I think, accurately correct, charge of the learned Chief Justice, in which nothing of importance seems to have been overlooked, they found: (1) that the road was out of repair; (2) that the want of repair of the road was the cause of the accident to the plaintiff; (3) that the accident might not have been avoided by the exercise of reasonable care on the part of the driver Casey; (4) that the accident might not have been avoided by the exercise of reasonable care on the part of the plaintiff; and (5) they assessed the damages to the plaintiff at the sum of \$1,200.

The jury seem to have found, with particularity, every issue in favour of the plaintiff and against the defendants.

It was contended that the existence of the limb or branch in the position over the way that I have before endeavoured to describe, was not and could not be a want of repair, and that the finding of the jury that the road was out of repair was necessarily wrong.

It was urged that there were two kinds of defects in the road, but, as I have before said, much attention does not seem to have been paid to the one in respect to the surface of the road, and as to the other, I am of the opinion that the learned Chief Justice was quite right when in his charge he said that he was bound to tell the jury that want of repair may exist, not only with regard to the surface of the highway, but with regard to something above the highway, because, although the surface of the highway may be in perfectly good repair, yet, if something exists or is allowed to remain above the highway interfering with its ordinary and reasonable use, this would constitute want of repair, and a breach of duty on the part of the municipality.

The case *Embler v. Town of Walkill*, 57 Hun. 384, was cited for the plaintiff. Defendants' counsel remarked that it did not apply, for it was dependent on the provisions of a particular statute. I have examined the case, and I do not see that the decision rested on the

provisions of the statute mentioned in it. That statute, so far as I see, only transferred the liability from the commissioners to the town, or made the town liable in all cases where the commissioners would have been liable. So far as the case affords light as to what would be negligence in not repairing, it seems to me applicable here, but not of course a binding authority, though a decision of the Supreme Court of the State of New York.

The learned Judge delivering the judgment said: "Commissioners of highways are charged with the duty of active vigilance and watchfulness in ascertaining the condition of the highways, and they must exercise proper care in their maintenance in a reasonably safe condition for all ordinary travel."

Should it be contended that such "active vigilance and watchfulness" exceeds the care in this respect required of municipalities here, the answer, as I think, is that, even so, the difference ceases to be a difference when, as in the present case, it is assumed that the municipality had notice of the condition of the highway.

In that case, as stated in the judgment, the tree in question stood upon the side of the highway, and its branches hung over the travelled portion of the road so low as to leave a space insufficient for the passage of a load of hay, and that condition had existed for more than ten years. Farther on the learned Judge said: "Those facts presented a case of inexcusable negligence, and there is no principle which will exonerate the town from the liability resulting therefrom." In that case the verdict for the injury sustained was for \$6,000, and the Court said that upon the facts and the law it was a plain case for the plaintiff.

So far as I see from perusing the report, it does not appear at what height from the surface of the road the branches were, but they were not sufficiently high to permit a load of hay to pass under them.

In the present case this height is given about eleven feet, but that height was not sufficient to let the plaintiff's load of hay pass under with safety, as the result shews,

Judgment. and the plaintiff's load consisted of about one ton of hay, not, as I think, an extraordinary load.

Ferguson, J.

The case *Derochie v. Town of Cornwall*, 21 A. R. 279, and the authority referred to in the judgment, shew, I think, that the question as to whether or not a highway is out of repair is a question for the jury, if not emphatically so; and, for reasons that I have sought to give, I am of the opinion that this jury were not necessarily wrong in finding that the road in question was out of repair because of the existence of this limb or branch in the position in which it was.

The question being one for the jury, and they not being necessarily wrong in their finding, I am unable, after a perusal of the evidence, without violating the rules laid down in *Phillips v. Martin*, 15 App. Cas. 193; *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152; *Commissioner for Railways v. Brown*, 13 App. Cas. 133, and others, to see how we can set aside or interfere with this finding of the jury that this road, at the place in question, was out of repair.

Then as to the alleged contributory negligence of the plaintiff. It is true, as appears, that the plaintiff was not an entire stranger to the road. It is in evidence that the plaintiff and Casey when approaching the place where the limb was overhanging, observed the situation, but not until they were near the place. It appears that, without stopping the team, they thought of or considered the matter, and concluded that they could pass under the limb in safety, and went on. The result was that Casey did pass safely, but the plaintiff did not. The jury had, no doubt, to consider whether or not, in all the circumstances, there was negligence or recklessness in arriving at the conclusion that they could pass safely, and in acting in accordance with that conclusion. Their finding being in the plaintiff's favour, I do not so far see how the Court can interfere.

It was, however, contended that the plaintiff was guilty of negligence, because, instead of lying on the hay and keeping close to it, he put up his feet for the purpose of

raising the limb, which he failed to do, the limb being more unyielding than he expected. It was urged that if the plaintiff had adopted the former course, he would have escaped, as Casey did. Looking at all the circumstances, it is not unreasonable to think that as the plaintiff approached the limb he became more or less alarmed, probably then believing that the conclusion that the passage could be made in safety was erroneous.

Then assuming negligence on the part of the defendants in permitting the limb or branch to remain there, and that there was not negligence on the part of the plaintiff or Casey in making the effort to pass under it, can it be fairly said that the plaintiff was guilty of negligence in doing what he did? He was not called upon to do the very best and wisest thing. I cannot but think that the principle embodied in the language of the judgment in the case *Town of Prescott v. Connell*, 22 S. C. R., at the foot of p. 162 and top of p. 163, is on this immediate subject much in favour of the plaintiff, and in support of the view taken by the jury, and I do not see how, in the face of the decisions already referred to, the Court can or should interfere with the finding.

I am of the opinion that the findings of the jury cannot be and should not be disturbed.

Then as to the amount of damages awarded I can only repeat what I have just written in the case *McCullough v. Anderson* on a like subject.*

* *McCullough v. Anderson* was an action to recover damages for injuries received by the plaintiff, while in the service of the defendants as a farm hand, from the kick of a horse. At the trial the jury found for the plaintiff, and assessed the damages at \$300.

A motion was made by the defendants to set aside the verdict and dismiss the action, or for a new trial.

Chute, Q.C., for the defendants.

C. E. Lyons and *M. Wright*, for the plaintiff.

On the 5th December, 1895, the Court gave judgment dismissing the motion, *ROBERTSON, J.*, dissenting.

Upon the question of damages the following observations were made by

FERGUSON, J.—It was also contended that the damages awarded are

Judgment. I think the verdict cannot properly be interfered with,
Ferguson, J. and that the motion should be refused with costs.

ROBERTSON, J., concurred.

MEREDITH, J.:—

No objection was made to the charge to the jury ; none reasonably could be made.

Nor was it contended in any other way that there is no liability in respect of a nuisance because of its being overhead, instead of, as usual, under-foot. If there were, apart from any difficulty in the defendants' way by reason of want of objection to the charge, I would unhesitatingly express my entire concurrence in the learned trial Judge's view of the question, as expressed in his charge to the jury.

The case was one entirely for the jury, and we cannot rightly interfere with their verdict or assessment of damages.

E. B. B.

excessive in amount. As the authorities stand at present, it is, I think, in the power of the Court to interfere where the damages are plainly excessive in amount, and the Court can see that such interference would be right and necessary to the ends of justice between the parties ; but I do not see the way to interfere, or that the Court should interfere, in the present case. All the evidence as to the extent of the injury sustained by the plaintiff, and the circumstances in which he received the injury, went fairly and properly to the jury. Some of the evidence was intended to shew and went to shew that the injury was not of a serious character, and that part of the plaintiff's suffering, inconvenience, expenses, and loss was attributable to a former injury received by him. Some of it went to shew that the injury was of a serious character, and that his suffering, inconvenience, expenses, and loss were not in any part or degree attributable to a former injury received by him. The jury, with all this before them, assessed the damages at a sum which, when the circumstances and surroundings of the parties are considered, appears to be large, it is true, but, as I think, not so large as to be unconscionable, or to shock one's ideas of right and wrong. It is not a case in which any legal measure of damages is afforded by which the Court can say that the jury was wrong.

[CHANCERY DIVISION.]

STEPHENS V. BEATTY.

Will—Construction—"Who May Then be Heirs-at-Law"—Deed—Delivery—Operation—Trusts and Trustees—Limitation of Actions—Trustee Act, 1891, sec. 13, sub-sec. 1, (a), (b)—Commencement of Statute—Balance in Trustee's Hands—Letter—Acknowledgment—Estoppel.

The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs forever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such share should be paid over or conveyed to those "who may then be the heirs-at-law of my said son," share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son, was all real estate:—

Held, per MACMAHON, J., the Judge at the trial, that the words above quoted signified those who would take real estate as upon an intestacy. *Coatworth v. Carson*, 24 O. R. 185, followed.

By deed dated the 2nd March, 1887, the defendant, as surviving trustee, conveyed the lands retained by him as the share of the plaintiff's husband, to his brothers and sisters as his heirs and heiresses-at-law.

This deed was, on the day of its date, signed and sealed by the defendant, and delivered by him to a person acting on behalf of the grantees, and wholly left the possession of the defendant on that day, and there was nothing to shew that he did not intend it to operate immediately:—

Held, by the Divisional Court, that it took effect from the day of its date. In this action begun on the 8th July, 1893, the plaintiff sought an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her husband's share, which she claimed under a marriage settlement. The defendant pleaded the Trustee Act, 1891, sec. 13, sub-sec. 1 (a) and (b), in bar of the action:—

Held, notwithstanding that a small balance of \$6 35, ascertained as early as the 3rd February, 1887, remained in the defendant's hands until the 21st July, 1887, that the statute began to run in his favour on the 2nd March, 1887, assuming a breach of trust on that day, and the plaintiff's action was barred before it was begun.

On the 27th September, 1892, the defendant wrote a letter to the plaintiff's solicitors in which he stated that all the affairs of the estate between himself, as trustee, and the heirs were wound-up "as long ago as July, 1887":—

Held, that this was not an acknowledgment which had the effect of taking the case out of the operation of the statute; and the defendant was not estopped by the letter from saying that the conveyance was as early as the 2nd March, 1887.

Judgment of MACMAHON, J., affirmed.

GEORGE STEPHENS died on the 26th July, 1875, leaving a widow and six children, one of whom was Henry Harrison Stephens, the husband of the plaintiff, and leaving all his property, real and personal, to trustees, of whom Statement.

Statement. the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs forever. By a codicil he directed that the share of his estate to which his son Henry Harrison Stephens should be entitled under his will should not be paid over or conveyed to him upon the decease of the testator's wife, but should be kept invested by the trustees during the natural life of Henry, and the income paid over annually to him during his natural life, for his sole benefit, and after his death that such share should be paid over or conveyed by the trustees "to those who may then be the heirs-at-law of my said son," share and share alike. "The above directions to my said trustees in the case of my said son are given and intended by me as a check upon his habits of profligacy, and if my said son shall, in the opinion of my said trustees, become totally and permanently reformed during his lifetime, I will and direct that they shall have power to pay over and convey the whole or any part of the said share to my said son at any time during his lifetime, for his own use absolutely, but it is my will and I direct that such power shall not be exercised by my said trustees unless they, in the exercise of their best judgment and discretion, shall deem my said son to be worthy of it by reason of such permanent reformation, and shall deem it safe and prudent to do so, and such opinion must be unanimous on the part of my said trustees in case of more than one."

The testator's widow died before 1st August, 1876; the plaintiff's marriage to Henry took place on the 5th May, 1885; and Henry died on the 21st September, 1886, leaving no issue.

By indenture dated the 4th May, 1885, Henry, in consideration of his intended marriage, assigned and conveyed to the plaintiff, her heirs and assigns, all his interest in the estate of his father.

By deed dated 1st August, 1876, the children of the testator made a partition of the lands of the testator among themselves, the trustees joining in the deed, which

provided that the lands thereby assigned as the share of Henry should be held and retained by the trustees on the trusts set forth in the codicil. Statement.

By deed dated the 2nd March, 1887, the defendant, as surviving trustee, conveyed the lands so retained to the brothers and sisters of Henry as his heirs and heiresses-at-law.

This action was begun on the 8th July, 1893. In it the plaintiff claimed an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her share of the estate, she claiming the share that was her husband's by virtue of the marriage settlement, or, alternatively, a portion of it as one of her husband's heirs, he having died since the Devolution of Estates Act.

The defendant pleaded, *inter alia*, that the Trustee Act, 1891, sec. 13, sub-sec. (1), (O.),* was a bar to the action, more than six years having elapsed between the 2nd March, 1887, the date of the conveyance of Henry's share to his brothers and sisters, and the 8th July, 1893, the day on which this action was begun.

The action was tried at Toronto before MACMAHON, J., without a jury, on the 8th May, 1895.

H. S. Osler, for the plaintiff.

Moss, Q. C., and *W. F. Kerr*, for the defendant.

May 16, 1895. MACMAHON, J.:—

I find that after the death of Henry Stephens, Dr. Beatty, the surviving trustee under the will of the testator, com-

* 13—(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or

Judgment.
MacMahon,
J.

municated with the plaintiff and paid to her the sum of \$71.85, being the amount he considered she was entitled to under the marriage settlement up to the time of the death of her husband, which sum included interest up to the date of payment, 3rd February, 1887, and for that the plaintiff gave a receipt in full. After that Dr. Beatty, being minded to relieve himself from his trusteeship, consulted Mr. William Kerr, and obtained his opinion as to who were to be regarded as the heirs-at-law of Henry Stephens under the codicil to the will of the testator George Stephens. Mr. Kerr advised him that Henry's brothers and sisters were his heirs-at-law, and prepared a conveyance to them, which was executed by Dr. Beatty on the 2nd March, and the affidavit of execution was sworn to that day. Immediately upon its execution Dr. Beatty laid down the deed on Mr. Kerr's desk, stating that it was the end of a long and thankless job. He at that time intended to divest himself of all his right and duties as trustee over the property, and was placing the title in the hands of Henry Stephens' heirs; and I find that the deed was handed to Dr. Powell (who had married one of the daughters of the testator and one of the devisees under the will), and that he took possession of and retained the deed until early in June of the same year, when he and Mrs. Powell came to Mr. Kerr's office for the purpose of having a power of attorney drawn from all the heirs-at-law of Henry Stephens to Dr. Powell.

person claiming through him had not been a trustee or person claiming through him.

(b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent, as if the claim had been against him in an action of debt for money had and received; but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

After the delivery of the deed on the 2nd March, 1887, Dr. Beatty did not interfere in any way or manner with the estate. He had in his hands at that time the sum of \$6.35, which he was willing to pay over to the heirs or the person representing the heirs of Henry Stephens; and Dr. Powell having in the meantime procured a power of attorney from Henry's brothers and sisters, he did pay over the same to Dr. Powell on the 21st July. But when the deed of the 2nd March was executed by Dr. Beatty and delivered to Dr. Powell, it was an unqualified delivery, and the deed was effectual to pass the property to the grantees from its date: *Doe Garnons v. Knight*, 5 B. & C. 671, at p. 692; *Xenos v. Wickham*, L. R. 2 H. L. 296, at p. 309. So, as to the conveyance of the land, the statute commenced to run against the plaintiff from the 2nd March, 1887.

The plaintiff's husband died in September, 1886, and she shortly after went to reside in New York. It was not till 1892,—nearly six years after the death of her husband,—that she communicated with Dr. Beatty making a claim upon the estate. Messrs. McCarthy & Co. were consulted in September, 1892, and they wrote to Dr. Beatty, who replied stating that he had had a communication from the plaintiff, and that he answered her letter on the 28th June, stating that the affairs had been wound up and closed several years since, as long ago as July, 1887. Now that statement is perfectly correct, for, although he had on the 2nd March, 1892, conveyed the real estate to those whom he regarded as the heirs of Henry Stephens, yet until he had paid over to those who were entitled to it, the \$6.35, he had that in his possession which belonged to the estate. But that had no connection with the conveying of the real estate, in respect of which the plaintiff would be barred by the statute, unless the trustee, Dr. Beatty, has been guilty of some fraud.

Unless the action could be considered as founded upon a fraud by Dr. Beatty, or to recover trust property still retained by him, or converted to his own use, he is entitled

Judgment. to plead the lapse of time as a bar, in like manner as if the
MacMahon, claim had been against him in an action of debt for money
J. had and received: see the Trustee Act, 54 Vict. ch. 19, sec. 13 (1) (a) and (b), which is the same as the Imperial Act 51 & 52 Vict. ch. 59, sec. 8 (1) (a) and (b).

There was no fraud imputed to Dr. Beatty, unless it could be said that in writing the letters to the plaintiff, and to McCarthy & Co., he was acting fraudulently. What had been done by him could have been ascertained by an inquiry specifically directed as to what disposition had been made of the real estate, or by a search in the registry office. There was no intention on the part of Dr. Beatty as trustee to deceive any one, or put the parties off their guard, by any statement he was making. I refer, as to the effect of the statute, to *In re Somerset*, [1894] 1 Ch. 231; *Thorne v. Heard*, 7 R. 100.

The action not having been brought until the 8th July, 1893, it is barred by the statute.

I think that by the codicil the share of the testator's estate to which Henry was entitled is taken out of the operation of the will, for it in effect provides that if they sell the land, the trustees are to keep his share invested during his life, and shall only pay to him the interest or dividends arising out of the share annually, and then, unless in a certain event, it is to be divided amongst those who may at Henry's death be his heirs-at-law. The event which might happen was this, that if the profligate life, which the father, by the codicil, said that Henry was living, should cease, and Henry should become totally and permanently reformed, then the trustees had power to convey the whole or any part of the estate to the son Henry absolutely. But it is left entirely to the exercise of the judgment and discretion of the trustees as to whether a permanent reformation had been made, and I find that the trustees, in the exercise of their best judgment and discretion, found that the reformation had not taken place.

What was in the hands of the trustee at the time of the death of Henry Stephens was (except the rents on

hand, which he paid to the plaintiff) real estate, and the codicil directs "that the share or portion of all my estate, both real and personal, to which my said son Henry is or shall be entitled shall not be paid over or conveyed to him upon the decease of my wife."

Judgment:
MacMahon,
J.

In *Coatsworth v. Carson*, 24 O. R. 185, where the testator, by his will, directed that the trustees should in certain events, after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst his "own right heirs," and although a blended fund derived from realty and personalty was thus created, the learned Chancellor held, following *Farrell v. Cameron*, 29 Gr. at p. 315, and *Tylee v. Deal*, 19 Gr. 601, that "my own right heirs" signified those who would take real estate as upon an intestacy. See also *In re Estate of Woodworth*, 1 Oldright (Nova Scotia) 101, and *Mearns v. Ancient Order of United Workmen*, 22 O. R. 34.

The action must be dismissed with costs.

The plaintiff appealed from the judgment of MACMAHON, J., and her appeal was argued before a Divisional Court composed of FERGUSON, ROBERTSON, and MEREDITH, JJ., on the 4th June, 1895.

Osler, Q.C., for the plaintiff. Henry took an equitable fee under the rule in Shelley's case, which passed to the plaintiff under the marriage settlement: *Spence v. Spence*, 12 C. B. N. S. 199; *Richardson v. Harrison*, 16 Q. B. D. 85. [MEREDITH, J., referred to *Evans v. Evans*, [1892] 2 Ch. 173: and *King v. Evans*, 24 S. C. R. 356.] If the plaintiff is not able to sustain her claim to the whole, then she takes a part as one of her husband's "then heirs." Under the Devolution of Estates Act the widow is entitled to one-half of the realty and personalty. *Low v. Smith*, 25 L. J. Ch. 503, meets the point that the will says "share and share alike;" see also *Kilner v. Leech*, 10 Beav. 362. *Mearns v. Ancient Order of United Workmen*, 22 O. R. 34, as to "legal heirs," does not apply. Henry's "then heirs" are those who would take his real estate upon

Argument. an intestacy: *Coatsworth v. Carson*, 24 O. R. 185. This action was brought within six years from the time the defendant obtained his discharge as trustee, and the deed of the 2nd March, 1887, was intended to operate only from the date of the discharge. That deed was executed by Beatty only, and not by the parties who could give a discharge. The letter of the defendant of the 27th September, 1892, was the best evidence of when the deed was delivered, or it constituted an estoppel, or it was an acknowledgment which prevented the statute from running. I refer to *Phillips v. Putnam Fire Ins. Co.*, 28 Wis. 472, where conduct prevented the statute from running, and to *Grant v. Lexington, &c., Ins. Co.*, 5 Ind. 23, where conduct was held to estop a party from setting up the statute. The evidence of the plaintiff shews she relied on this letter in regard to the time of beginning the action.

N. F. Davidson, on the same side. On the question of estoppel, I refer to *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. 307, 316; *Seton v. Lafone*, 19 Q. B. D. 68; and on the effect of the words "share and share alike," to *Doody v. Higgins*, 2 K. & J. 729. Henry had no power to partition, if the plaintiff takes as purchaser.

Moss, Q.C., for the defendant. The efficacy of the deed of 2nd March, 1887, depended upon its sealing and delivery, and it took effect immediately thereon: Elphinstone on the Interpretation of Deeds, 2nd ed., p. 120; *Doe Garnons v. Knight*, 5 B. & C. 671, 692; *Xenos v. Wickham*, L. R. 2 H. L. at p. 309. The plaintiff's letter of the 24th June, 1892, was the first intimation to the defendant of the plaintiff's claim. The statute began to run on the 21st September, 1886, the date of Henry's death, or, at all events, on the 4th October, 1886, when the defendant gave the plaintiff distinct notice that her right to any share in the estate had ceased. The English enactment similar to sec. 13 of our Trustee Act, 1891, has been construed as applying to the time of the occurrence of the breach: *In re Somerset*.

[1894] 1 Ch. 231; *Thorne v. Heard*, [1893] 3 Ch. 530; *Argument S. C.*, [1894] 1 Ch. 599. Where a demand is made on a man who disputes it, saying the matter passed out of my hands on such a day, he is not estopped from shewing the actual state of the facts. Here there was no intention to state what was untrue to mislead and induce another to act upon it. All the elements must be present to constitute an estoppel: Bigelow on Estoppel, 3rd ed., p. 484; and one element is the intention that the other party shall act upon the representation. See also *Walker v. Hyman*, 1 A. R. 345, 353, 356. The evidence shews that the plaintiff did not really rely upon the letter. 'Next, I say Henry never had more than a life interest. The rule in Shelley's case does not govern. Heirs-at-law "then" are *personæ designatæ*, and therefore purchasers. It is not necessary to discuss the cases previous to *Evans v. Evans*, [1892] 2 Ch. 173, upon which I rely. The trend of authority is towards giving effect to the intention of the testator, despite the particular words used: Challis on Real Property, 2nd ed., p. 154; and here the codicil clearly indicates that Henry was to have a life interest only, unless the trustees should become convinced of his reformation, which, as the trial Judge has found, they did not. It was a grant for life with an estate over to persons designated. Then, is the widow one of the persons designated as "then" heirs? She is not an heir in the ordinary sense: *In re Estate of Woodworth*, Oldright (Nova Scotia) 101; *Coatsworth v. Carson*, 24 O. R. 185; *Mearns v. Ancient Order of United Workmen*, 22 O. R. 34. And the Devolution of Estates Act does not alter the estate which the wife takes: see sec. 4, sub-sec. 1; but sub-sec. 2 shews that the property is not to be absolutely vested, but the widow may elect to take her dower. It depends upon her election whether she becomes an heir in any sense; she has not elected; and she must elect formally.

W. F. Kerr, on the same side. There can be no estoppel; certainty is an essential to all estoppels: Bigelow, p. 490. At the best, the defendant's statement in the

Argument. letter was an equivocal one—"as long ago as July, 1887." As to the widow being one of the heirs-at-law, does the Devolution of Estates Act apply, when we are dealing with the estate of the father? As to the running of the statute, I refer to Hewitt on Statutes of Limitations, pp. 27-29.

Davidson, in reply.

December 5, 1895. FERGUSON, J.:—

Notwithstanding ingenious contentions to the contrary, I am of the opinion that it is clearly shewn by the evidence that the deed bearing date the 2nd day of March, 1887, by which the defendant conveyed and transferred to those who he was advised were the heirs-at-law of the testator, the share of the estate that by the deed of partition was to be the share of the plaintiff's late husband H. H. Stephens, was fully executed so as to take effect upon and from the day of its date, the 2nd day of March, 1887. On that day, as shewn by the evidence of Mr. Kerr, this deed was signed and sealed by the defendant, and when he had done this he threw it down upon the desk, saying, "that is the end of a long and thankless job." Mr. Kerr says that the defendant then either handed the deed to Dr. Powell himself, or authorized him, Mr. Kerr, to do so for the heirs; that the deed, within a few minutes, passed into Dr. Powell's hands, and that Dr. Powell took it away with him the same day. Dr. Powell was the husband of one of these heirs. He was then in fact acting for these heirs, and it was at least then contemplated (some of the evidence would lead to the conclusion that it had been agreed) that he should be appointed the attorney of these heirs for the purpose of managing the estate, and he was subsequently so appointed their attorney for this purpose, as I understand, by a formal power of attorney. The deed was thus, after being signed and sealed, delivered by the defendant to one acting on behalf of the grantees named in it, and wholly left the possession of the defendant, the grantor, on that day, the 2nd of March. The

evidence of this seems to be uncontradicted, and one can ^{Judgment.} entertain no doubt now that such were the facts. The ^{Ferguson, J.} evidence of the defendant himself is to the same effect, and Dr. Powell has since died.

Less than is stated here would have been enough to shew a complete execution and delivery of this deed. In the case *Xenos v. Wickham*, L. R. 2 H. L. at p. 309, the language of Mr. Justice Bayley in *Doe Garmons v. Knight*, 5 B. & C. at p. 692, is referred to and quoted with unqualified approval. It is this: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to shew he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery of it to the party who is to take by it, or to any person for his use, is not essential." This authority is referred to in *Elphinstone on the Interpretation of Deeds*, 2nd ed., at p. 120, where many other authorities on the subject are also referred to. It is also in accord with what is said in *Sheppard's Touchstone* on the subject.

In the present case there was the delivery of the deed as stated above, and there is positively nothing to shew that the defendant did not intend it to operate immediately; but, on the contrary of this, as it appears to me, all that appears goes to shew that the defendant did intend it to operate immediately. The delivery of this deed was, as I think, an unqualified delivery. I think it is fully shewn that the deed was a complete and perfect instrument on the day of its date, and was in full operation on and after that day.

The plaintiff claims to be entitled to or largely interested in the part of the estate that on the partition that was made was awarded to her late husband H. H. Stephens. She asks an account shewing the dealings of the defendant with the estate of which this was a part, namely, the estate of the late George Stephens, the father of her husband, of which the defendant was surviving executor

Judgment. and trustee under the will, and that the defendant may be
Ferguson, J. ordered to convey and transfer to her her share of that estate. The above mentioned claim is the only claim that the plaintiff has, or professes to have, in respect of the estate.

The defendant states what was the property held in trust at the time of the death of the plaintiff's husband, and says that under the advice of counsel he, in good faith, conveyed the same to the brothers and sisters of the plaintiff's late husband H. H. Stephens, on the 2nd day of March, 1887, more than six years before the commencement of this action, as being, at the time of the death of the said H. H. Stephens, the persons entitled thereto, and he sets up the Trustee Act, 1891, sec. 13, sub-sec. 1 (a) and (b), in answer and in bar to the plaintiff's action.

It is not needful that I should set forth or discuss these sub-sections of the Act here, as it was not disputed that the defendant is entitled to the benefit of them, and was at liberty to plead the lapse of time as a bar to the action in like manner and to the like extent, as if the claim had been made against him "in an action of debt for money had and received." The statutory bar in such case would be the period of six years, and more than six years elapsed after the execution of the deed above referred to and before the commencement of this action.

The defendant in his evidence states that his transactions with the estate terminated positively on the 2nd March, 1887, when he signed the above mentioned deed. It was contended that by reason of a small balance of \$6.35 remaining in the hands of the defendant until the 21st day of July following, he could not properly say that his dealings with the estate terminated till that sum was paid over, and that the statute could not commence to run in the defendant's favour till that date, the 21st July, 1887. This was a balance that remained after paying some taxes and some small charges for digging the grave and in respect of the funeral of the plaintiff's husband H. H. Stephens. It was an ascertained balance as early

as the 3rd February, 1887, and the defendant says the Judgment reason it was not paid over was that he could not get Dr. Ferguson, J. Powell to take it sooner. No authority was referred to in support of this contention. It was urged that until this small sum was paid the estate was not finally wound-up. I can only say that I have been unable to bring myself to think that this contention is right. The deed of the 2nd March, 1887, though the part before me is not signed by them, contains a release by the devisees of the defendant from all trusts in the will of George Stephens and the codicil thereto contained, and from all claims or demands under or by reason of the will or codicil or in connection with the estate. This small sum was then, and had for some time been, an ascertained balance, and some of the parties to receive still smaller shares of it were out of the country. The defendant paid it over as soon as he could get Powell to receive it, and I cannot think that this trifling circumstance can have the effect contended for.

On the 24th June, 1892, the plaintiff wrote the defendant making a claim. The defendant answered this letter on the 28th June, 1892. The answer is: "In reply to yours of the 24th inst., I have to say that all the affairs of the estate of the late George Stephens, as between myself as trustee and the heirs of the said estate, were wound-up and closed several years since, and I am discharged as trustee from any and all connection therewith."

The defendant had received a letter from a firm of solicitors who wrote on behalf of the plaintiff; and on the 27th September, 1892, answered as follows: "In reply to a letter from Mrs. Stephens about the 28th of June last, I informed her 'that all the affairs of the estate of the late George Stephens, between myself as trustee and heirs of the said estate, were wound-up and closed several years since.' That took place as long ago as July, 1887. I cannot see that I have anything to do with the matter, as all properties concerning which I had any trust were conveyed to the heirs of the estate at that time, and that any claim that Mrs. Stephens may think that she has must be

Judgment. settled with said heirs, as I have no connection with any such since the date referred to." And upon this letter of the 27th September, 1892, two contentions were based.

Ferguson, J.

One of them was that it was an acknowledgment which had the effect of taking the case out of the operation of the statute.

It has been said, and I think logically and rightly, that when it is intended to rely upon the fact of an acknowledgment on the part of the defendant, to prevent his taking advantage of the bar of the statute, it is necessary to consider carefully under what statute that bar arose, and the particular wording of the exception provided for by the statute: *Banning on Limitation of Actions*, 2nd ed., p. 39. The statute pleaded here gives the bar the same as in an action of debt for money had and received. It has for many years, I think, been settled law that nothing can take a debt out of the statute unless it amounts to an express promise to pay or an unconditional acknowledgment of the debt from which such a promise may be implied. This has, I think, generally been considered the law since the case *Tanner v. Smart*, 6 B. & C. 603: see *Green v. Humphreys*, 26 Ch. D. 474. I am entirely unable to see how the letter can be an acknowledgment taking the case out of the operation of the statute. It certainly acknowledges no liability, and it contains nothing from which a promise can, as I think, possibly be implied. It is the very contrary of this. It repudiates all liability.

Again, it was contended that by reason of this letter of the 27th September, 1892, the defendant is estopped from saying that he conveyed the property to the supposed heirs at a period earlier than July, 1887, for, referring to what he had before written the plaintiff, the letter says "that took place as long ago as July, 1887," and again "as all properties concerning which I had any trust were conveyed to the heirs of the estate at that time."

The contention was that this was a representation that it was in July, 1887, that the property had been conveyed, and that this representation was such as to estop the

defendant from shewing and relying upon the fact that the conveyance was made as early as the 2nd March, 1887, and that, as a consequence, the statute could not have commenced to run till July, 1887, and within the period of six years before the action. Judgment.
Ferguson, J.

According to Bigelow on Estoppel, see 3rd ed., p. 484, there must have been a false representation or a concealment of material facts. The representation must have been made with knowledge of the facts to a person ignorant of the truth of the matter. It must have been made with the intention that the other party should act upon it. The representation must be plain, not doubtful. Certainty is essential to all estoppels: p. 490. Again, there must have been knowledge, actual or constructive, by the party making the representation that the other party intended at the time to act upon it: p. 529. And the representation must have been really acted upon, the other party acting differently from the way he would otherwise have acted—otherwise there is no estoppel.

If these tests are applied, it seems plain that there is no estoppel upon the defendant here, that is, it seems plain to me.

I may here say that formerly in pleading an estoppel, the highest of the three degrees of certainty was required, and no *intendment* was allowed in favour of the pleader, and although the law of pleading has been changed, yet the evidence must come up to what was formerly required in the plea.

One may well ask, is there certainty as to time in the representation contained in this letter? The answer must be in the negative. Again, was it made with the intention that the other party should act upon it? The answer seems to me to be that it simply gave the information that the whole matter was at an end—that the matters of the estate had been finally settled, so far as the writer had concern, many years before that time. Again, was there knowledge at the time that the other party intended to act upon the statement? The answer must, I think, be in the

Judgment. negative. Again, did the plaintiff really act upon the statement or representation? It is not plain that she did. Why should she delay bringing her action for this reason. She had the information as early as June, 1892. Was there not some other reason for the delay?

Ferguson, J. In the case *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. at pp. 316-317, Brett, J., stated three propositions respecting an estoppel in pais, which he characterized as recognized propositions. I cannot bring myself to think that the present case falls under any one of these, and the learned Judge said that the party must bring his case within one of them.

One asks, did the defendant wilfully endeavour to cause the plaintiff to believe in a certain state of things which he knew to be false, and did he do so with that certainty of statement necessary in an estoppel? I am of opinion that he did not, and that he had no motive further than to say that the affairs of the estate, so far as he had any concern, had been settled, and finally settled, many years before that time, and that he could not be called upon to do anything. Did the defendant in writing this letter intend that the plaintiff should act upon it in a certain way, or in any particular way, as stated in the second and third propositions laid down by Brett, J., before referred to? The answer is, I think, clearly in the negative. He only meant or intended as I have before stated.

The case *Seton v. Lafone*, 19 Q. B. D. 68, was relied on in support of the estoppel contended for. That case is, as I think, vastly different from the present one. There there was a wharfinger's warrant for goods, which was negotiable and had been negotiated. A letter was written, unequivocal and absolutely certain in its contents, stating that the goods were in hand, and demanding rent that was unpaid, the rent meaning, I suppose, storage money or the like for the goods. The person to whom the letter was sent was supposed to be interested in the goods, but he was not; but on the faith of the statement made to him he purchased the warrant.

Lord Esher, M. R., said in that case that before framing ^{Judgment.} the propositions in *Carr v. London and North Western R. W. Co.*, supra, he had referred to nearly all the cases on the subject, and sought to derive from them the different propositions relating to the law of estoppel; and Fry, L. J., said: "The law must be taken by this Court as laid down in *Carr v. London and North Western R. W. Co.*" ^{Ferguson, J.}

The plaintiff cited *Grant v. Lexington, &c., Ins. Co.*, 5 Ind. 23, and *Phillips v. Putnam Fire Ins. Co.*, 28 Wis. 472. I fail, however, to see their application to the present case (in her favour).

After the best consideration I have been able to give the matter, I am of the opinion that the contention that the defendant is estopped from saying that the conveyance was as early as the 2nd March, 1887, should not prevail.

Then, if it be assumed that there was a breach of trust by the defendant, that breach took place on the 2nd day of March, 1887, more than six years before the commencement of the action, and there being, as I think, nothing to take the case out of the operation of the statute, the plaintiff is barred by lapse of time, and, assuming this to be so, it is not necessary to consider the other questions argued. I am of the opinion that the conclusion of the learned trial Judge was right, that his judgment should be affirmed, and that this motion should be refused with costs.

ROBERTSON, J., concurred.

MEREDITH, J.:—

Upon the whole evidence in the case, I am unable to say that the finding of fact by the learned trial Judge, upon which he gave effect to the defence of the Statute of Limitation in question, is erroneous; although it may be that, had that finding been more in accordance with the statement contained in the defendant's letter to the plaintiff's solicitors, the same thing might be said of it; and in that case the defendant would have, perhaps, but himself to

Judgment. blame if such a finding were not in accordance with the very truth of the matter.

Meredith, J.

What was written in that letter was apparently written in a somewhat cursory manner, and without any great degree of definiteness; but just as one writing from memory only, without knowing of any reason for exactness as to the time, might write.

"In reply to a letter from Mrs. Stephens dated 28th June last, I informed her 'that all the affairs of the estate of the late George Stephens, as between myself as trustee and the heirs of said estate, were wound-up and closed several years since.'" Then follow the words so much relied upon: "That took place as long ago as July, 1887." The letter, to the plaintiff, referred to is produced, and is correctly quoted from; the words immediately following those quoted are, "and I am discharged from any and all connection therewith."

There is, in the circumstances of this case, in my judgment, nothing like an estoppel in the words "that took place so long ago as July, 1887." They are evidence in favour of the contention that that did take place at that time, and not at the earlier date, but no more than that.

The power of attorney to Dr. Powell does not aid that contention; it was given, not to authorize him to settle with and take the conveyance from the trustee, but solely to empower him to let or sell and manage the land conveyed by the deed dated the 2nd March; and it states that they, the grantors of that deed, are sole owners of the land; that is, owners under that deed; and the power of attorney is dated the 8th June.

It was not contended that, if that finding was sustained—if the true time was the month of March, not July—the provisions of the statute were not applicable to the case; and I can perceive no good reason for taking it out of its protection.

As to the delivery of the deed, the case of *McDonald v. McDonald*, 44 U. C. R. 291, may be referred to: that case, though reversed in the Court of Appeal, is said to have

been reversed upon grounds other than that the deed ^{Judgment.} would not have come into operation under the circumstances mentioned in the reported judgment of the Court of Queen's Bench. ^{Meredith, J.}

This motion must, therefore, be dismissed on this ground : we need not deal with the formidable objection that the plaintiff is not entitled to anything under the will in question.

E. B. B.

[CHANCERY DIVISION.]

HENDERSON ET AL. V. HENDERSON.

Limitation of Actions—R. S. O. ch. 111—Purchase of Farm—Possession by Son of Purchaser—Payment of Mortgage—Contribution by Son—“Profits of the Land”—“Rent.”

In March, 1881, the plaintiffs' testator purchased a farm and had it conveyed to himself, giving a mortgage for the balance of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon an understanding that he should contribute such sum as could be spared off the farm, after its yielding a living to him, towards payment of the mortgage thereon, until it should be paid, when, on payment of an annuity to his father and mother, he was to have the farm. No payments were made by him on account of the annuity. He continued in actual possession and occupation from April, 1881, till his death in November, 1892, and contributed towards payment of the mortgage, which, by means of his contributions and payments made by his father, was paid off. His father declined to give him a conveyance, but said he would leave him the farm by will. He died before his father, leaving all his property by will to his wife and child. The father subsequently devised the farm to the plaintiffs and died in 1894, the son's widow continuing in possession. In an action of ejectment brought against her by the plaintiffs :—

Held, MEREDITH, J., dissenting, that the son was not a tenant from year to year nor a lessee, and the money he contributed was not “rent” nor “profits of the land ;” and there being no acknowledgment by the son in writing, nor anything else which could stop the running of the statute, the title of the father was extinguished, under sec. 15 of R. S. O. ch. 111, at least six months before the death of the son.

THIS was an action of ejectment brought by two of the ^{Statement.} sons, being the executors of the will, of David Henderson the elder, deceased, against the widow of Robert Henderson, another son of the deceased. The land in question was

Statement. the west half of lot 13 in the 9th concession of the township of Otonabee. David Henderson the elder had the paper title, but the defendant claimed title by the adverse possession of her husband from April, 1881, till November 1892, when he died, or, alternatively, under an alleged agreement between the father and the son for a conveyance of the land to the latter, which she prayed to have specifically performed. The facts are fully stated in the judgments.

The action was tried before STREET, J., at Peterborough, and judgment was given by him for the plaintiffs for recovery of the land without costs, and dismissing the claim or counterclaim of the defendant for specific performance, also without costs.

The defendant appealed from the judgment of STREET, J., and her appeal was argued before a Divisional Court composed of FERGUSON, ROBERTSON, and MEREDITH, JJ., on the 5th and 6th June, 1895.

E. B. Edwards, for the defendant.

Watson, Q. C., and *L. M. Hayes*, for the plaintiffs.

The arguments of counsel are fully stated in the judgments.

The following cases were referred to: *Keffer v. Keffer*, 27 C. P. 257; *Doe Perry v. Henderson*, 3 U. C. R. 486; *Ryan v. Ryan*, 5 S. C. R. 387; *Kent v. Kent*, 20 O. R. 445, 19 A. R. 352; *McGugan v. Smith*, 21 S. C. R. 263; *Turner v. Prevost*, 17 S. C. R. 283; *Roberts v. Hall* 1 O. R. 388; *Walker v. Boughner*, 18 O. R. 448; *Orr v. Orr*, 21 Gr. 397; *Jibb v. Jibb*, 24 Gr. 487.

December 5, 1895. FERGUSON, J. :—

The farm in question was purchased by the late David Henderson, the father of the plaintiffs and of the late Robert Henderson, who was the husband of the defendant.

The purchase money was the sum of \$5,500. At the

time of the purchase, \$1,900 of this purchase money was paid, and the remaining \$3,600 was obtained by giving a mortgage upon the farm. The conveyance from the vendor was made to the late David Henderson, and that mortgage was made and executed by him. It does not appear that the purchaser, the late David Henderson, went, pursuant to his purchase, into actual possession of the farm. The purchase took place in March, 1881, and in the month of April, 1881, the late Robert Henderson (who was the defendant's husband), with the assent of his father, given after a conference with the other sons, the plaintiffs, went into possession of the farm, upon an understanding, shewn, I think, sufficiently for purposes here by the evidence of a witness manifestly adverse to the defendant, namely, John Henderson, one of the plaintiffs, that Robert should contribute such sum as could be spared off the farm, after its yielding a living to him, towards payment or satisfaction of the mortgage upon the farm until the mortgage was paid, and that then, or, perhaps, on paying \$100 a year towards the support and maintenance of his parents for their lives or the life of the survivor of them, he should have the farm. There is other evidence, as well, in respect of this understanding, and it matters not for the present consideration that such understanding was not proved as an agreement that could and should be specifically performed by the Court, as found and decided by the learned Judge. What is proved serves, nevertheless, to shew the origin of Robert's possession, and how it was that he was put in possession of the farm. I think the evidence sufficiently shews that he, Robert, entered into possession under the expectation and belief that the farm was to be his. There is evidence (though objected to) going to shew that other lands had been purchased by the father and paid for in much the same way as this farm, which were intended for and did eventually go to other sons, brothers of Robert.

Robert Henderson entered into possession of the farm in this way, and contributed and continued to contribute

Judgment. towards payment and satisfaction of the mortgage until it was fully paid, his contributions in all amounting to something more than \$1,900; after which he, through one of his brothers, asked his father to give him a conveyance of the farm. The father declined to do this, but said he would leave the farm to Robert by will.

Ferguson, J.

Robert Henderson was continuously in actual possession and occupation of the farm from the 22nd day of April, 1881, till his death on the 16th day of November, 1892. It was stated that for two or three weeks before his death, he had, under the direction of a medical adviser and for change of air, lived as a visitor, as I understand, with one of his brothers; but this can, as I think, make no possible difference in respect of his actual possession of the farm. His wife and child, during this short period, remained on the farm; she, however, visiting her husband frequently during the time.

Robert, manifestly from the evidence, was under the impression and belief that his interests as regarded the ownership of the farm were entirely within the power and under the control of his father, and for some time before his death, and, if I now recollect the evidence rightly, especially after his health had failed, and it was supposed, not only by others, but by himself as well, that he could not long survive, he manifested anxiety about this. Robert, nevertheless, made and left a will, leaving all his property to his wife and child in divisions or proportions which I need not here state. This will does not mention this farm; but it was not disputed that the general words employed in the will were sufficient to be and constitute a devise of the farm, if it were assumed that Robert was the owner of it. The defendant, Robert's widow, and their child, have since Robert's death continued in possession of the farm. I think I need not here delay to say anything concerning some evidence given regarding some tenants or intruders, which seems to me of no consequence.

After the death of Robert, his father made a will,

whereby the farm was devised, but not to Robert. The Judgment. plaintiffs are the executors of this last will of the father, Ferguson, J. and they bring this action of ejectment against the defendant, Robert's widow, to recover possession of the farm. The child, as was remarked by the learned trial Judge, should have been a party defendant as well; but possibly the child not being a party will not ultimately make any difference.

On the record the defendant sets up and claims the benefit of the statute known as "The Real Property Limitation Act."

It appears that Robert Henderson during his lifetime was in actual possession and occupation of this farm from April, 1881, to the time of his death, in November, 1892—a period of eleven years and almost seven months—and that from Robert's death till the commencement of this action on the 13th day of August, 1894, his widow and child continued in possession, and they are still in possession of the farm.

On the purchase by and conveyance of the farm to the father, the law put him into possession of it, there being no other person in possession in fact. When Robert went into possession, that possession of the land by the father ceased, and the father was not thereafter, as I think, in receipt of the "profits of the land," within the meaning of that expression in sub-sec. 1 of sec. 5 of the Act R. S. O. ch. 111.

In Hewitt on the Statutes of Limitations, at p. 70, the author says that the "receipt of the profits" of land is treated throughout the statute as equivalent to possession, but that the true meaning of the words as used in the Acts is a question of considerable difficulty. Reference is then made to the opinion of Lord St. Leonards (see Sugden's Real Property Statutes, 46 and 47) that the expression "in receipt of the profits of any land" is employed to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land, and that the words were introduced in order to prevent any question

Judgment. arising where the owner, although he received the proceeds, did not actually occupy the land. After some further discussion, the author submits that the words "receipt of the profits" are used in the Act to mean the receipt of the full profits of the land, "whether in the form of rent or otherwise."

Ferguson, J.

Section 14 of our Act provides that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of the Act. A similar provision is found in the English Act. It is referred to in Hewitt, and seems to me to be the reason for the author adding the words "whether in the form of rent or otherwise." In Darby & Bosanquet on the Statutes of Limitations, 2nd ed., pp. 300 and 301, reference is also made to opinions of Lord St. Leonards, and the subject discussed much in the same way as in Hewitt.

The provisions of the 14th section of the Act have, as I think clear, no application to the position of Robert Henderson while upon this farm. He was not a tenant from year to year, nor was he a lessee of the farm, and the money he contributed as aforesaid was not, as I think, rent within the meaning of the provisions of that section.

The meaning of the word "rent," as used in the first line of sub-sec. 1 of sec. 5 of our Act, is clearly shewn in the case *Grant v. Ellis*, 9 M. & W. at p. 122. It does not mean rent reserved on leases, or by contract between the parties, but, as is said, must be confined to rents existing as an inheritance distinct from the land: see *Hewitt v. Earl of Harrington*, [1893] 2 Ch. 497. With this particular subject I apprehend one has no concern in this case: *Finch v. Gilray*, 16 O. R. 393 and 16 A. R. 484.

Although I have not found a decision bearing directly upon the subject of the contributions made by Robert Henderson towards satisfaction of the incumbrance on the farm, some of which were paid to the mortgagee in

presence of Robert himself, not by the father, but by a ^{Judgment} brother, I am clearly of the opinion that these were not ^{Ferguson, J.} and could not have been a receipt by the father of the profits of the land within the meaning of the expression used in sub-sec. 1 of sec. 5. These contributions were made for a specific purpose, and were applied, in fact, for that purpose. They were in a way measured, but, nevertheless, largely, or at all events to some extent, at the discretion of Robert, and were not in any view the full proceeds or the equivalent of the full proceeds of the land; and during several years after the mortgage had been fully paid, and while Robert was still living and in possession and enjoyment of the farm, no such moneys or any moneys in respect of the farm were paid by him to his father. These payments or contributions were not profits of the land at all.

The words "in receipt of the profits of land," used in the Act, mean the receipt of the actual proceeds of the land: Shelford's Real Property Statutes, 9th ed., p. 121. This is of course apart from the provisions of section 14, which, as I have said, cannot apply in the present case. See also Sweet's Dictionary, p. 646.

Then the father ceased to be in possession when Robert entered in April, 1881, and he was not thereafter "in receipt of the profits" of the land. Robert was not a bailiff or caretaker, and went into possession in the circumstances that I have before indicated.

I refer here to the language of the late Chief Justice Robinson in delivering the judgment of the Court in *Doe Perry v. Henderson*, 3 U. C. R. at p. 499: "The origin of the possession was clearly not adverse, and the son was let in not to occupy as owner, but only upon the confidence that he would entitle himself to become owner at a future day. That would not signify, if it be true (as I assumed at the trial) that Robert Perry being on the land twenty years, without paying rent or acknowledging title, would render it of no moment with what expectation, or with what assent, or under what agreement he went upon

Judgment. the land in the first instance. The decisions in England upon the statute 2 & 3 Will. IV., which is similar to ours compel us so to hold.”

Ferguson, J.

I am of the opinion that the statute commenced to run against the title of the father and in favour of Robert Henderson at the latest in April, 1882: It is immaterial to consider whether or not this commenced in April, 1881, or whether section 7 has any application here.

There was no acknowledgment by Robert in writing within the meaning of the provisions of section 13 of the Act, nor was there the payment of any rent by Robert, for the contributions before mentioned were clearly not rent. No one of the things mentioned in the statute as occurrences that would arrest or stop the running of it happened or took place, and it appears to me that at least six months before the death of Robert Henderson, which, as before stated, took place in November, 1892, the title of his father to this farm was extinguished under the provisions of section 15 of the Act, and that Robert thereupon became entitled to the farm. It can make no possible difference that Robert did not know that he was acquiring; or that he had acquired title by virtue of the Act.

The plaintiffs have, therefore, no title, and their action should be dismissed with costs. The judgment in respect of the defendant's claim for specific performance of the alleged agreement should be affirmed, but the defendant should pay the costs of the issue arising upon this claim. If need be, the costs may be set off or set off *pro tanto*.

ROBERTSON, J. :—

This is an action to recover lands, formerly called an action of ejectment. The plaintiffs must, therefore, recover on the strength of their own title, and not by reason of any defect in that of the defendant. The plaintiffs are the executors of the last will and testament of David Henderson, who died in February, 1894, and who was the

father of the plaintiffs. The will bears date 12th July, 1893. The defendant is the widow of a deceased son of the testator, whose name was Robert, and who died on 16th November, 1892, leaving him surviving his widow, the defendant, and an only child, Mossie Henderson, an infant of tender years. Robert died in possession of the land, and his widow and child have ever since his death remained in possession. By his will Robert devised one-half of his estate to his widow during her widowhood, and the remaining half to his child, and appointed Christopher Hewson and William Brealey the executors thereof, who have obtained probate, and who on 26th September, 1893, granted and conveyed all the real estate of their testator to the defendant and her said child Mossie, in terms of the devises to them. Judgment.
Robertson, J.

The other facts of the case, as I make them out from the evidence, are as follows. The deceased David Henderson had several sons besides the deceased Robert, the plaintiffs being two of them. He had also several daughters. The whole family seemed to have worked together after the children grew up, for the general benefit; the intention of the father being to provide each of his sons with a farm. He had, previous to March, 1881, more than one farm, but, in order to settle Robert, it was concluded that the land in question should be purchased and that all should go on as formerly and contribute towards the purchase money, which was \$5,500. At the time of the purchase \$1,900 was paid down. The conveyance was taken in the name of the father (David), who executed a mortgage on the same land to secure the balance, \$3,600. When this transaction was completed, which was some time in April, 1881, the son Robert was told by his father to go into possession, work the farm, and contribute what he could from the proceeds thereof towards paying off the mortgage. This was done. Robert not having a wife at the time, one of his sisters kept house for him until he was married to the present defendant. Robert cultivated the farm, made improvements thereon in the way of

Judgment: fencing, building, etc., and contributed about \$1,900
Robertson, J. towards paying off the mortgage, which was fully paid off and the ordinary statutory release executed by the mortgagee. This was several years before Robert's death, and from that time, *i.e.*, from the time of paying off the mortgage, Robert retained the whole proceeds of the farm to his own use. It is clear to my mind that the intention from the outset, so far as the father (David) and so far as Robert understood, was that the farm was to be devised or conveyed by the former to the latter, subject to an annuity, if the father so determined, of \$100 a year to be paid to him during his life and the life of his wife, the mother of Robert, or the survivor of them. I think, however, that Robert, having become afflicted with an incurable disease, felt that there was no real security in this intention being carried out, in case he should predecease his father, and he, therefore, made an effort to induce his father to convey to him (Robert) during his lifetime; but the old man refused to do this, stating that he would keep to the original understanding; and the old man did make a will devising the farm to Robert in terms of that understanding. Robert, however, died on the 16th November, 1892, in possession of the farm, having made his will disposing of the whole of his estate, as before stated. The father, surviving, revoked his former will, and on 12th July, 1893, made another will by which he attempted to otherwise dispose of the farm in question to and in favour of these plaintiffs; and this action was commenced on 13th August, 1894.

The defendant, *inter alia*, sets up the Statute of Limitations, and that her husband, Robert Henderson, was in possession of the lands and in receipt of the rents and profits thereof from 22nd April, 1881, until his death on 16th November, 1892; and that she, the defendant, his widow, and Mossie Henderson, his daughter, have ever since been and still are in possession of the said lands and in receipt of the rents and profits thereof, claiming title to the same under the said Robert, deceased.

Defendant also sets up the fact that the testator, David Henderson, was not at the time of his death, nor was he at any time, nor were the plaintiffs at any time, in the possession of the said lands or of the rents and profits thereof. She also sets up an agreement, which may be termed "a family arrangement," in reference to this property; but, as I have come to a conclusion favourable to the defendant on the other branch of the case, it is unnecessary for me to discuss or dispose of the questions arising thereon.

As a matter of fact, the testator David never was in the actual personal or visible possession of the property. Such as he had by virtue of the conveyance, under the statute, of course goes without saying; but the person in actual and visible possession was the son Robert from the date of the conveyance to his father, which possession he took by and with the consent of his father, and on the understanding that he was to contribute as much as could be spared off the farm after his own living expenses, etc., towards payment of the balance of the purchase money so secured by the mortgage, and the payment after of the \$100 annuity, before referred to by me—after which the farm should be his. This is made clear by the evidence of the plaintiff David himself, who certainly was not a willing witness in favour of the defendant, and whose conduct in the witness box shewed that he was anything but willing to give the defendant the benefit of what he knew, more than was drawn out of him by cross-examination and after much prevarication, etc.

The learned counsel for the plaintiff argued before us that the payment by Robert, from time to time, of moneys on account of the mortgage was evidence of an acknowledgment of title in the purchaser, David, which took the case out of the statute; but I cannot agree with that contention. The statute respecting the limitation of actions relating to real property, etc., R. S. O. 1887, ch. 111, sec. 4, declares that no person shall make an entry or distress, or bring any action to recover any land or rent, but within

Judgment. ten years next, after the time at which the right to make
Robertson, J. such entry or distress, or to bring such action, first accrued
to some person through whom he claims, etc.

Then section 5 declares that in the construction of this Act, the right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned ;

1. Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in the receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

2. Where the person claiming such land or rent claims the estate or interest of some deceased person who continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

By sec. 2, sub-sec. 3, of the Act, "rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land.

Section 4, above recited, is the same as the Imperial Act 3 & 4 Will. IV., ch. 27, sec. 2 ; and sec. 5 is the same as sec. 3 of the Imperial Act.

In my judgment, the contributions of Robert in his lifetime towards the payment of the mortgage do not come within the words of this enactment. These contributions were not made as "rent," nor could they in any sense be construed as rent, nor were they in any way charged on the land. Robert was to contribute what he could after his expenses of living and working of the farm were provided for. The amount was not fixed or agreed upon.

The word "rent" in the statute does not apply to rent reserved on a lease, but to rent which is charged upon land, rent for which an assize would lie: *Robertson, J. Judgment.* *Paget v. Foley*, 2 Bing. N. C. 679. An annuity charged on land was considered to be a case within the Act: *James v. Salter*, 3 Bing. N. C. 544. These are instances of the class of rents to which the enactment in question applies—rents in which there is a legal estate, and not incident to, but having a legal existence distinct from, the legal estate in the lands out of which they issue. The person entitled to rent reserved on a demise, has no estate in the rent: *Prescott v. Boucher*, 3 B. & Ad. 849. The statute plainly contemplates an estate in rent and an estate in land. Where rent on a demise is contemplated, other language is used, as in the 42nd section, which speaks of arrears of rent (same as section 17 of our Act).

Rolfe, B., in *Grant v. Ellis*, 9 M. & W. at p. 122, says: "The defendant contends that this is not a case within the statute at all. He contends that the word 'rent' in the second section of the statute cannot be taken as having any reference to rents such as that now in question, namely, rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation; but must be confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have an assize, such as ancient rent service, fee-farm rents, or the like. We accede to this latter view of the case. In order to come to a just conclusion as to the meaning of the word 'rent,' as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word 'recover' as used in the second section. The enactment is, that no person shall make an entry or distress, or bring an action to 'recover' any land or rent, but within twenty years, etc. Now, so far as relates to land, the word 'recover' in this passage clearly means the same thing as 'obtain possession or seisin of.' The clause assumes one party to be in wrongful seisin or possession

Judgment. of land to which another has the right, and then limits
Robertson, J. the time within which the right must be asserted. If such be the meaning of the word 'recover,' when used with reference to one of its objects—'land,' it is very reasonable to suppose that the legislature intended it to have the same meaning in respect to the other object—'rent.' It is true, indeed, that with respect to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the terre-tenant as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still, before the passing of this Act, a party seised of rents, whether rents-service, rent charges, or rents-seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, '*quod recuperet seisinam*;' and in each case the party was entitled to a writ of *habere facias seisinam*, which, in case of a recovery of rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin, with all its consequences, as in the case of a subsequent disseisin of lands or houses."

Rents are classed by Blackstone among incorporeal hereditaments. The word "rent," or "render," *redditus*, according to him, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance: see 1 Inst. 144. It is defined to be a certain profit issuing yearly out of

lands and tenements corporeal. This profit must also be Judgment. certain; or that which may be reduced to a certainty by Robertson, J. either party. It must also issue yearly; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year; yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because these profits do annually arise and are annually renewed: Plowd. 13; 8 Rep. 71. It must issue out of lands and tenements corporeal; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain: Kerr's Bl. Com., 3rd ed., vol. 2, p. 40.

As this is the law, the contributions of Robert towards payment of the mortgage in no way can be construed as an acknowledgment of title in his father on the part of Robert, or as the receipt of rent by his father, such as is contemplated by the statute.

The circumstances of the case are not in any essential particularly different from those in *Keffer v. Keffer*, 27 C. P. 257, where it is held that the son on entering became tenant at will to his father, so that the statute began to run in a year from that time. Here that tenancy expired in April, 1882, and Robert continued in undisturbed possession until he died in November, 1892, some months after the title of the father had ceased to exist; and the defendant continuing in possession under the devise to her and her daughter by Robert, the plaintiffs have no right to disturb that possession, and the action should, therefore, be dismissed with costs.

I also refer to *Doe Perry v. Henderson*, 3 U. C. R. 486, and to Hewitt on Limitation of Actions, pp. 70, 71.

In reference to the defendant's claim for specific performance of the alleged agreement, I agree with my learned brother Ferguson that a case has not been made out to warrant the judgment for specific performance.

Judgment. MEREDITH, J. :—

Meredith, J.

The main, if not the only, ground upon which the defendant relied at the trial was the claim for specific performance.

The finding of the learned trial Judge upon that claim was that there was no contract under which the son was to become the owner of the land; that there was an expectation on the part of the son, and an intention on the part of the father, but no promise, that the son should have it; and the testimony upon which the claim was urged—that of the defendant and her brother—was said by the trial Judge to have been not at all satisfactory to his mind.

Though it may be said that such finding is quite supported by evidence, and is one which could not be rightly disregarded, it is not necessary to go so far: it is enough, for the purposes of this branch of the defence, to say that no case for specific performance was sufficiently proved.

It would be a dangerous thing, indeed, if, under such circumstances as exist in this case, and upon such evidence as that adduced at the trial, specific performance were enforced; and it is just to say that if in requiring stricter and much better proof, under such circumstances, the very truth of the matter is not always reached and full justice always done, those who fail to have such agreements put in writing, or otherwise sufficiently evidenced, have but themselves to blame for their loss; it is better that an occasional injustice of that character should be suffered, than that the doors of the Courts should be opened to false claims based upon untruth, which any laxity of the rules, in this respect so long prevailing, would assuredly encourage.

It is satisfactory to me that there is no disagreement upon this branch of the case, however much everyone's sympathies may go with the defendant.

But there must be, I regret, a disagreement here upon the other branch of the case.

I am unable to agree with the judgment of this Court Judgment. that the son acquired title to the lands under the Statute Meredith, J. of Limitations.

This branch of the defence, so little, if at all, urged at the trial, was the main ground urged in support of this motion.

Although I have had time for consideration of the subject in the light thrown upon it by the judgments just read, I am yet unable to see how effect can rightly be given to it.

We differ almost at the starting point: I cannot agree with the judgment that, "when Robert went into possession, that possession of the father ceased;" that is, the possession of the father in the eye of the law, which in the immediately preceding words is accurately stated to have been in him.

The son entered under an agreement with the father which acknowledged the father's title, and, put in the strongest way for the son, gave him title only at the father's death. The son entered into and held possession under and by virtue of the father's title, never denying it, never repudiating it, but always living up to it, during his lifetime; paying from time to time to the father, or those acting for him, all the profits and rents received from the land beyond what was needed for his sustenance and the improvement of the property; the father meanwhile paying off the mortgage, largely out of his own moneys, and from time to time entering and staying upon the land by way of visits there; his other sons also visiting and doing farm work there, and in the father's interests receiving and seeing to the proper application of the net profits and rents; some of the daughters going with Robert to live on this farm and keep house for him there when he first went there, and one or other of the daughters so remaining until his marriage.

How can it, in these and the other circumstances of the case, be rightly said that the son was in possession to the exclusion of the father? How can it rightly be said that

Judgment. he was not in under his father, his possession the father's
Meredith, J. possession, subject only to his rights under the agree-
ment ?

Each party alleges and bears testimony to the fact that the son went in and continued in under the father, under an express agreement continuing, at all events, till the son's death ; the only difference between them, substantially, is, whether or not the son was to become entitled to the land at the father's or mother's death. We cannot rightly disregard this, and all the evidence in the case, and say that the son was not in, or did not continue in, under such an agreement, performing its terms upon his part until his death, or at all events until the purchase money was fully paid.

Can it be that, if the son were in under the agreement which the defendant alleges, fulfilling its terms until his death, and his legal representatives becoming entitled, upon the father's death, to the specific performance which the defence claims, title has been acquired under the statute ? If so, would he not equally so have acquired title if the agreement had been to pay a certain sum each year during his life, and he had paid it ? See *Doe Milburn v. Edgar*, 2 Bing. N. C. 498.

On the other hand, if the plaintiffs' contention as to the terms of the agreement be right, the son was substantially, in equity, a tenant for a life or lives, performing from year to year the terms of his holding, and surely acquiring no rights under the statute ; or else a trustee, servant, or agent for the father, having possession for the father only ; and the payments made by him from year to year, were 'rents' or 'profits of the land.' If not, what were they ? Why paid to the father or his other sons for him ? If a mere tenant at will, what concern had he with payments of the mortgage ?

Whichever agreement the son was in under, how could the father have evicted him so long as he was faithfully performing the terms of it on his part ? Whether he was a trustee of land, and the rents received and profits realized from it,

to cultivate and improve it, support himself out of them, ^{Judgment} and pay the surplus to the father, to be applied in pay- ^{Meredith, J.} ment of the mortgage, or in equity the *cestui que trust* of his father, who was as vendor a trustee of the lands for him as purchaser, the Act would not, under recent decisions, be applicable to the case : see sec. 30 and sec. 5, sub-sec. 8 ; and *Drummond v. Sant*, L. R. 6 Q. B. 763 ; and *Warren v. Murray*, [1894] 2 Q. B. 648.

If the parties to the agreement chose to treat it as a binding tenancy for such a term, or if it were valid in equity, though at law only a tenancy at will, time should run only from the end of the term : see *Archbold v. Scully*, 9 H. L. C. 360 ; *Walsh v. Lonsdale*, 21 Ch. D. 9 ; *Lowther v. Heaver*, 41 Ch. D. 248.

The cases of *Doe Perry v. Henderson*, 3 U. C. R. 486, and *Keffer v. Keffer*, 27 C. P. 257, and the cases referred to in them, seem to me quite distinguishable from this case ; for here the son continued from year to year performing the terms of the agreement under which he entered until the time of his death, or until the purchase money was paid : it is a case of either a tenancy for life, or of an agreement to convey, the terms of which were from year to year complied with.

A holding under which the son paid annually to the father the net profits of the land cannot, in my judgment, be considered a tenancy at will ; and if it were, and if the statute put an end to it at the expiration of the year, it should, in the facts of this case, and having regard especially to the annual payments, be held that a new tenancy was from time to time created down to the time of the last payment made by the son to the father : see *Doe Groves v. Groves*, 10 Q. B. 486, and *Hodgson v. Hooper*, 3 E. & E. 149.

In my opinion, therefore, this motion fails and should be dismissed with costs.

There is nothing in the contention that the judgment should be set aside because the son's daughter, and a devisee under his will, was not made a party to the action.

Judgment. She would have been a proper party, and should have been added so that the rights of all parties concerned might have been disposed of in the one action and at the one time. But the defendant might have had her added before trial. The plaintiffs, in their own interests, should have added her ; but the defendant is not prejudiced ; it is, indeed, no concern of hers now ; she has had all her claims fully tried and adjudicated upon ; it is the plaintiffs who may be put to another action, but that is their own doing. The Court might before the trial, of its own motion, or in the interests of the daughter, have interfered ; but the learned trial Judge did not, further than to deprive the plaintiff of costs against the defendant for that cause ; and it is now no concern of the defendant so far as her own rights or interests go.

E. B. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. WOODYATT.

Contempt of Court—Certiorari—Notice to Magistrate.

After the issue of a writ of *certiorari* for the removal of a conviction for the purpose of quashing it, the writ, though served on the clerk of the peace, did not come to the notice or knowledge of magistrate, who enforced the conviction by the issue of a distress warrant:—

Held, that the magistrate was not guilty of contempt.

ON the 13th day of June, 1895, an order *nisi* was obtained Statement.
on behalf of one Fleming, who was, on the 13th day of April, 1894, convicted by the defendant, the police magistrate of the city of Brantford for an offence against the Liquor License Act, calling upon the defendant to shew cause why he should not be attached for contempt in authorizing, sanctioning or permitting the enforcement of the said conviction.

It appeared from the material filed on obtaining the order *nisi*, that a writ of *certiorari* to remove the said conviction into this Court was duly issued on the 6th day of June, 1894, directed to the defendant and to the clerk of the peace of the county of Brant, that such *certiorari* was served on the acting clerk of the peace on the 7th day of June, 1894; that it never was served on the defendant, and the only evidence of its having come to the knowledge of the defendant was the statement in an affidavit filed by Fleming and made by him, that "the said Woodyatt had full notice and knowledge of the granting of the order for the *certiorari*, and of the service of the writ of *certiorari* at or about the time of the taking place of said proceedings respectively."

On the 22nd November, 1895, *Wilkes*, Q.C., shewed cause before the Queen's Bench Division and filed the affidavit of the defendant, stating, among other things, "that he had no knowledge whatever that a writ of *cer-*

Argument. *tiorari* had been issued in the Fleming case until some time after the said Fleming's arrest and payment of the fine and costs under the said conviction."

McCullough, supported the order *nisi*.

December 14, 1895. ARMOUR, C. J. :—

The writ of *certiorari*, although directed to the defendant, was never served upon him, and I do not think that in the absence of such service we would be warranted in granting an attachment against the defendant.

In *Rex v. Bottoms*, 1 East 299, an indictment was found at the quarter sessions of the peace, and at the same sessions the attorney for the prosecutrix delivered to the clerk of the peace a writ of *certiorari* for removing the said indictment into the Court of King's Bench, which writ was handed up to the chairman and was seen by him and other magistrates on the Bench, the writ was addressed "To the Keepers of our Peace, etc." Lord Kenyon, C.J., said, at p. 302, "that if the *certiorari* were produced in Court, and came to their knowledge, it could not admit of an argument whether or not it should be obeyed. No doubt the Court were bound to yield obedience to it, and all subsequent proceedings upon the matter were void. Here it was sworn that the writ was handed up to the Bench and seen by several of the magistrates, which is sufficient notice. And this Court would not lay down rules for regulating the manner in which the writ should be delivered to the justices below."

It is clear that in this case Lord Kenyon thought that the writ of *certiorari* was well served upon "The Keepers of our Peace," to whom it was directed, by being delivered to the clerk of the peace during the sessions, and being handed by him to the chairman.

It would be going far beyond this decision to hold that in such a case as the present, the defendant could be held guilty of contempt of a writ addressed to him, but never served upon him, upon the vague statement in an affidavit

that he had full notice and knowledge of the service of Judgment.
the writ of *certiorari* upon the acting clerk of the peace at Armour, C.J.
or about the time of its taking place without saying how
or in what particular manner, or at what particular time
he acquired such notice or knowledge.

The defendant, however, explicitly denies any such
notice or knowledge, and in this respect the affidavit of
the applicant is fully answered.

The order *nisi* must, therefore, be discharged with costs.

FALCONBRIDGE and STREET, JJ., concurred.

G. F.

[QUEEN'S BENCH DIVISION.]

HOBSON V. SHANNON.

Division Courts—Garnishee—New Trial—R. S. O. ch. 51, sec. 145.

The provisions of section 145 of the Division Courts Act as to applying for
a new trial within fourteen days do not apply to a garnishee.

Re McLean v. McLeod, 5 P. R. 467, followed.

Re Tipling v. Cole, 21 O. R. 276, distinguished.

Judgment of BOYD, C., 26 O. R. 554, affirmed.

THIS was an appeal from the judgment of BOYD, C., Statement.
reported in 26 O. R. 554, dismissing a motion for a writ of
prohibition to the Junior Judge of the county of York
from further proceeding, with an application then pend-
ing before him for a new trial in the Eighth Division
Court of the county of York, in the matter of a certain
plaint, wherein Henry Hobson was primary creditor,
Andrew Shannon primary debtor, and the Corporation
of the City of Toronto, garnishees.

The facts are set out in the report of the case appealed
from.

The appeal was argued in Michaelmas Sittings, Novem-

Argument. ber 19th, 1895, before a Divisional Court, composed of ARMOUR, C. J., and FALCONBRIDGE, J.

Raney, for the appeal.

Cartwright, contra.

December 14, 1895. ARMOUR, C. J. :—

The case principally relied on in support of this appeal, was the decision of this Division in *Re Tipling v. Cole*, 21 O. R. 276.

That case, however, turned upon the construction of section 144 of the Division Courts Act, R. S. O. ch. 51, and we held that the words of that section "in any case heard before him," applied as well to the Judge's decision upon the hearing of a garnishee summons as to his decision in any other case.

Section 145 does not in terms cover an application for a new trial made by a garnishee, for the provision is that "the Judge upon the application of either party within fourteen days after the trial, and upon good grounds being shewn, may grant a new trial," clearly referring by the use of the words "either party," to either the plaintiff or defendant in the suit.

Besides putting our decision upon the ground of the construction of this section, we think that the decision of *Re McLean v. McLeod*, 5 P. R. 467, having been made more than twenty years ago, and having been acted upon ever since, should not now be reversed by us even if we differed from it, but that it should be left to the Legislature, if it deems fit, to put the application for a new trial by a garnishee upon the same footing as the application for a new trial by either party plaintiff or defendant to a suit between them alone.

The appeal must, therefore, be dismissed with costs.

FALCONBRIDGE, J., concurred.

G. F. H.

[QUEEN'S BENCH DIVISION.]

McGUINNESS V. DAFOE.

Justice of the Peace—Felony—Issue of Warrant—Absence of Written Information—Reasonable Suspicion—Notice of Action—Sufficiency of.

A magistrate acts without jurisdiction, and so renders himself liable in trespass, where, without any written information charging another with a felony, he issues a warrant for his arrest therefor; and, while a reasonable ground for the belief that such person had committed the felony, might justify the magistrate in arresting such person himself, it does not enable him to issue his warrant for his arrest by another.

Ashley's Case, 6 Co. 320, followed.

The notice of action in this case alleged that the defendant on the 8th of September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th of September maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused plaintiff to be brought before him, and to be committed for trial, and to be confined in the common gaol, alleging the subsequent indictment of the plaintiff, his trial on the charge, and his acquittal:—

Held, a good notice of action in trespass.

THIS was an action tried before FALCONBRIDGE, J., without a jury, at Napanee, at the Spring Assizes of 1895, the jury having by consent been dispensed with. Statement.

The action was for trespass and malicious prosecution, arising out of the arrest of the plaintiff, for the alleged burning of a baker shop in the village of Roblin.

The defendant pleaded "not guilty," and in the margin of the statement of defence, referred to the following statutes:—

R. S. O. ch. 73, sec. 1, sub-secs. 1 and 2; sections 4, 9, 13, 14, 15, and 20, a Public Act; 51 Vict. ch. 2, sec. 1 (O.), a Public Act; 55 & 56 Vict. ch. 29 (D.), sections 558, 559, 975, 976, 977, and 979, a Public Act.

The notice of action which had been served on the defendant previous to the commencement of the action, was as follows:—

To P. W. Dafoe, a justice of the peace in and for the county of Lennox and Addington.

Take notice, that at the expiration of one month from the service of this notice upon you, I, Robert McGuinness,

Statement. of lot number seventeen, in the ninth concession of the township of Richmond in the county of Lennox and Addington, intend to commence and prosecute an action for damages against you in the Queen's Bench Division of the High Court of Justice for Ontario. For that you did, on the 8th day of September, 1893, at the village of Roblin, in the township of Richmond, in the county of Lennox and Addington, wrongfully, maliciously, illegally and without reasonable and probable cause, issue your warrant and cause me to be arrested upon a charge of arson, which arrest took place on the 6th day of September, 1893, on lot number seventeen, in the 9th concession of Richmond, in the county of Lennox and Addington, which said arrest was made, maliciously and without reasonable and probable cause, and caused me to be kept under arrest.

And, thereafter, on the 8th day of September, 1893, did maliciously, illegally, wrongfully and without reasonable and probable cause, cause me, the said Robert McGuiness, to be brought before you at the said village of Roblin, and on the said 8th day of September, 1893, did wrongfully, maliciously, illegally, and without reasonable and probable cause, at the village of Roblin aforesaid, did cause me to be committed for trial to the common gaol at Napanee upon said charge, whereupon I was confined in the said common gaol at Napanee for the space of five days, when I was let out on bail to appear at the next Court of competent jurisdiction, and subsequently an indictment was laid before the grand jury summoned for the Court of Oyer and Terminer and general gaol delivery, held on the 16th day of October, 1893, at Napanee, and on the 18th day of October, 1893, the said grand jury brought in a true bill, and subsequently when I was brought up before the petit jury and put on trial for the said charge, no evidence being offered, I was acquitted of the said charge.

And for damages for my loss of time and injury to my business, and for the recovery of the costs and expenses which I have incurred by reason of such malicious and

wrongful arrest and imprisonment without reasonable and probable cause. Statement.

Dated this 31st day of January, 1894.

(Signed) ROBERT MCGUINNESS,

By John Williams, his Attorney and Solicitor.

The plaintiff was arrested on a warrant issued by the defendant, a magistrate, on the charge of having set fire to a baker shop in the village of Roblin, on which he was committed for trial, and on which he was afterwards indicted and acquitted. The warrant was issued without any written information having been sworn to. Before the issuing of the warrant and the arrest of the plaintiff, an information had been sworn to by one Hall, in which it was charged that William Bowen and other persons unknown, had conspired to burn down the building, and on this information, Bowen was arrested. After his arrest, he made a confession to the defendant in which he stated that the plaintiff had suggested to him the burning of the property for the purpose of getting the insurance on it, and he finally made a bargain with the plaintiff to pay him \$20.00 to burn the building down. It also appeared that before the fire occurred, there were rumors in the village, which came to the defendant's knowledge, that a conspiracy existed between the plaintiff and Bowen to burn the building down. Before the defendant issued the warrant against the plaintiff, he consulted with the partner of the county attorney, whom he said advised him to arrest the plaintiff, and an information was drawn up, but had not been signed before the warrant was issued, and although the magistrate intended that the information should have been sworn to, he did not think it was absolutely necessary, as he thought the information which had been sworn to for the arrest of Bowen, covered the plaintiff's case. On the plaintiff being brought before the defendant as a magistrate, evidence was given, and the plaintiff, though asked if he had anything to say, made no objection to the jurisdiction of the magistrate.

Statement. The plaintiff also claimed that the defendant had acted maliciously, but as the judgment of the Court does not proceed on this ground, the evidence on this point is not given.

At the close of the case, it was moved to enter judgment for the defendant on the following grounds, namely :

That the action was not maintainable, for as regards the alleged trespass, the order of commitment had not been set aside as required by sec. 4 of R. S. O. ch. 73 ; and also because no valid notice of action had been given ; the notice of action being for malicious prosecution, not for trespass ; that as to the malicious prosecution, the defendant, having been brought before the magistrate, and having made no objection to his jurisdiction, the magistrate had power to deal with the case, and act on the evidence brought before him ; that it was necessary to allege and prove malice and want of reasonable and probable cause, which the plaintiff had failed to do ; and that the evidence sufficiently established absence of malice and reasonable and probable cause.

The learned Judge was of opinion that the cause of action for malicious prosecution failed, as no malice or want of reasonable and probable cause was shewn ; and that as to the trespass, without deciding whether it was necessary to set aside the commitment before an action could be brought, he was of the opinion that the action failed by reason of the absence of proper notice of action, the notice of action served being for malicious prosecution and not for trespass.

The learned Judge, therefore, dismissed the action with costs.

The plaintiff moved on motion to set aside the judgment entered for the defendant and for a new trial.

In Michaelmas Sittings, November 18th, 1895, before a Divisional Court, composed of ARMOUR, C. J., and STREET, J.

Clute, Q. C., supported the motion.

W. R. Riddell, contra.

December 14, 1895. ARMOUR, C. J. :—

Judgment.

Armour, C.J.

The nonsuit in this case must be set aside.

The defendant was clearly acting without jurisdiction in issuing a warrant for the arrest of the plaintiff under which he was arrested and brought before him without an information in writing and under oath, and was liable in trespass for the arrest so made.

The notice of action, we think, sufficiently sets forth the cause of action, which was the said trespass.

It was argued somewhat vehemently, that the defendant, a felony having been committed, and he having a reasonable ground of suspicion that the plaintiff was guilty of it, could justify the commanding of the constable by warrant to make the arrest.

But in *Sir Anthony Ashley's* case, 6 Coke 320, at p. 322, it was resolved "that if felony be done, and one hath suspicion upon probable matter that another is guilty of it * *, by reason of this, he may arrest the party so suspected, to the end that he may subject him to justice.

But in this case three things are to be observed :

1. That a felony be done.
2. That he who doth arrest hath suspicion upon probable cause, which may be pleaded, and is traversable.
3. That he, himself, who hath the suspicion, arrest the party.

For he cannot command another to do it, for *suspicion* is a thing individual and personal, and cannot extend to another person than to him who hath it.

Also it was resolved, that if felony be done, and the common fame and voice is that one hath committed it, this is good cause for him who knows of it to arrest the party, to the intent that he may be brought to justice ; but none can arrest the party suspected by the command of him that hath the suspicion."

The nonsuit will be set aside, and as it was granted on the motion of the defendant, he must pay the costs of and incidental to the trial and of this motion, forthwith after taxation thereof.

STREET, J., concurred.

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G. F. H.

[QUEEN'S BENCH DIVISION.]

REGINA V. FLEMING.

*Police Magistrate—Ratepayer of Municipality to which Fine Payable—
Payment by Salary—Disqualification.*

Section 419 (a) of the Municipal Act, 1892, which provides that a magistrate shall not be disqualified from acting as such by reason of the fine or penalty, or part thereof, on conviction going to the municipality of which he is a ratepayer, includes a police magistrate.

Where a police magistrate appointed under R. S. O. ch. 72, is paid a salary by the municipality instead of by fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, and so is not thereby disqualified.

Semble, that in such a case there would have been no disqualification at common law.

Statement. THIS was a motion to make absolute an order *nisi* issued herein.

The defendant was, on the 13th April, 1894, convicted before the police magistrate of the city of Brantford, of an offence against the Liquor License Act, upon the complaint of a constable of that city, not being an inspector or an officer appointed by the Lieutenant-Governor or by the license commissioners.

The conviction having been brought before this Court upon *certiorari*, a motion was made to quash it for defects appearing on the face of it, and upon an affidavit to the effect that the said police magistrate was paid his salary as police magistrate by the municipality of the city of Brantford, and that the fine imposed by the said conviction was payable to the municipality of the said city of Brantford, and that the said police magistrate was a ratepayer of the said city; and upon such motion the Court granted an order *nisi* to quash the conviction, on the ground only that the convicting magistrate was disqualified from trying the case by reason of the fine belonging to the municipality which paid his salary, refusing it upon all other grounds.

In Michaelmas Sittings, November 22nd, 1895, before the Queen's Bench Division, composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., McCullough supported

the order *nisi*. The police magistrate was disqualified by reason of his being a ratepayer of the city of Brantford. The authorities are clear on the point. It will be contended, however, that section 419 of the Consolidated Municipal Act of 1892, 55 Vict. ch. 45 (O.), removes this disqualification, but that section applies to magistrates only, and not to police magistrates. Argument.

Wilkes, Q.C., contra. There was no disqualification here. Section 419 (a) removes it. The word "magistrate" used in that section clearly includes a police magistrate. Section 18 of the Police Magistrates' Act, R. S. O. ch. 72, expressly provides that every police magistrate shall *ex officio* be a justice of the peace for the whole county, etc., for which he has been appointed. Police magistrates also under the provisions of sec. 2 of ch. 72 is paid by salary and not by fees, and they have, therefore, no pecuniary interest in convictions.

December 14th, 1895. ARMOUR, C. J.:—

I do not think that the fact that the police magistrate was a ratepayer of the city of Brantford to which the fine imposed by the conviction was payable would have disqualified the police magistrate at common law from trying the case, but any such supposed cause of disqualification has been removed by section 419a of the Consolidated Municipal Act, 1892, which provides that "a magistrate is not disqualified to act as a magistrate where in case of a conviction the fine or penalty, or part thereof, goes to a municipality in which the magistrate is a ratepayer." The term "magistrate," used in this section, clearly including a police magistrate.

Nor do I think that the police magistrate was disqualified from trying the case merely by reason of the fact that his salary was payable by the city of Brantford, and the fine imposed by the conviction was payable to the city of Brantford.

The police magistrate was appointed under the provi-

Judgment. sions of the Act R. S. O. ch. 72, and provision is made by that Act for the payment of his salary, and such salary does not in any way depend upon any convictions to be made by him, and is payable to him whether any convictions have been made by him or not.

It is clear, therefore, that the police magistrate had no pecuniary interest in the charge against the defendant which resulted in this conviction, and was not disqualified therefore from making the said conviction.

The order *nisi* will, therefore, be discharged with costs. See *Regina v. Handsley*, 8 Q. B. D. 383; *Dimes v. Proprietors of the Grand Junction Canal*, 3 H. L. C. 759; *Regina v. Recorder of Cambridge*, 8 E. & B. 637; *Regina v. Farrant*, 20 Q. B. D. 58; *Leeson v. General Council of Medical Registration and Education*, 43 Ch. D. 366; *Regina v. Gaisford*, [1892] 1 Q. B. 381; *Regina v. Bolingbroke*, [1893] 2 Q. B. 347; *Ex parte Overseers of Workington*, [1894] 1 Q. B. 416; *Allinson v. General Council of Medical Registration and Education*, [1894] 1 Q. B. 750; *Regina v. Justices of County of Dublin*, [1894] 2 Ir. Rep. 527; *Regina v. Huggins*, [1895] 1 Q. B. 563.

FALCONBRIDGE, J., concurred.

G. F. H.

[QUEEN'S BENCH DIVISION.]

LARKIN V. GARDINER.

Contract—Sale of Land—Offer to Purchase—Withdrawal.

A parcel of land having been placed by the plaintiff in a land agent's hands for sale, the defendant offered to purchase it, and signed a form of agreement for sale and purchase, which was taken by the agent to the plaintiff and was signed by him, but before the defendant was notified thereof he gave notice to the agent withdrawing his offer:—

Held, that the instrument, though in form an agreement, was in substance a mere offer, and as defendant had withdrawn before he was notified of its acceptance, there was no completed agreement.

THIS was an action for the specific performance of a Statement. contract for the sale of land, brought by Jane Larkin, alleging herself to be the vendor, against the defendant, who had, as she alleged, entered into a contract with her.

The defendant denied the making of any contract, and alleged a want of title in the vendor and a cancellation of the contract if any existed.

The property had been placed 'in the hands of one Nesbitt, a land agent, by the plaintiff for sale on her behalf. The defendant went to Nesbitt and offered \$1,900 for the property. Nesbitt stated, as the fact was, that he was not authorized to sell at that price, but that if the defendant would sign an agreement to purchase at that price, he would submit the matter to the plaintiff. Thereupon Nesbitt prepared a form of agreement, beginning "I, Jane Larkin of Toronto, married woman, agree to sell, through John A. Nesbitt as my agent, and I, David Gardiner of the city of Toronto, baker, agree to buy, all that certain parcel," etc.

This was signed by the defendant at about seven p.m. on the 22nd April, 1895, and left by him with Nesbitt. Early next morning Nesbitt went to the plaintiff's house and she signed the agreement. At about one o'clock on the same day, the defendant gave written notice to Nesbitt withdrawing from the offer he had made. At the time he received this notice, Nesbitt had taken no step to com-

Statement. communicate to the defendant the fact that the plaintiff had accepted his offer or had signed the agreement. The agreement with the two signatures attached to it, had simply remained in his possession as agent for the plaintiff without communication to any one of the fact that the plaintiff had completed it by her signature. Subsequently the defendant, while always repudiating the existence of any agreement on his part to purchase, and expressly without prejudice to that position, upon being served with an abstract of title, made objections to it, and upon these not being satisfactorily answered, refused to do anything further, whereupon the present action was brought.

The action was tried before STREET, J., at the Sittings for trial without a jury, at Toronto, on 21st October, 1895.

Irwin, for the plaintiff.

Bicknell, for the defendant.

The learned Judge reserved his decision, and subsequently delivered the following judgment.

November 6th, 1895. STREET, J.:—

The instrument signed by the defendant, although drawn in the form of an agreement, must, in my opinion, be treated as a mere offer to purchase which might be withdrawn before it had been accepted by the plaintiff; and the only question to be determined is, whether the mere signature of the defendant without any thing more was a sufficient acceptance.

In *Brogden v. Metropolitan R. W. Co.*, 2 App. Cas. 666, Lord Blackburn, at p. 691, says: "I have always believed the law to be this, that whenever an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that

thing, he is bound." And he goes on to say, at p. 692, Judgment.
"But when you come to the general proposition which Mr. Street, J.
Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that."

Now, I think it would be unreasonable to hold in the present case that the defendant having made his offer to purchase, did not impliedly stipulate that in some form or other he should be made aware of the plaintiff's decision with regard to it—either by a letter informing him of the fact, or by the delivery to him of the contract signed by the plaintiff. I do not think it would be consistent with what we must assume the intention of the parties to have been that the mere signature of the plaintiff not communicated to him, should convert his offer into a binding contract. If I am right in so viewing the matter, then it follows that until the plaintiff had done something irrevocable towards communicating to him her acceptance of his offer, he was at liberty to withdraw it. The posting of a letter to him, or the verbal communication to him, of the fact that she had signed the contract, would have been sufficient. But the delivery to her own agent of the contract with her signature to it, was a revocable act until it had been communicated to the defendant, and was of no more force than if she had kept the instrument in her own drawer after signing it. If it had been possible to hold that Nesbitt was agent for the defendant to receive notice of the completion of the contract, his knowledge that the plaintiff had signed it, would of course have bound the defendant, but there is not the slightest ground for any such finding.

In my opinion, therefore, the defendant was within his rights when he withdrew the offer he had made, and no contract binding upon either party ever existed: *Dunlop v. Higgins*, 1 H. L. C. 381; *Dominion Bank v. Knowlton*, 25 Gr. 125; *Re National Savings Bank Association*;

Judgment. *Hebb's Case*, L. R. 4 Eq. 9; *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256.

The defendant has not waived his right to repudiate any contract by the manner in which he has proceeded with the investigation of the title. His position has been: "There is no contract on my part to purchase, but if you shew me to my satisfaction that you have a good title, I may carry out my offer." The title offered not proving satisfactory, he refused to proceed further with the matter.

The action, in my opinion, must be dismissed with costs.

The plaintiff moved on notice to set aside the judgment entered for the defendant, and to enter the judgment in his favour.

In Michaelmas Sittings, November 22nd, 1895, before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, J., *O. M. Arnold*, supported the motion. The instrument signed here was a completed agreement, and not merely an offer. Nesbitt was the agent of the defendant to procure the acceptance of the offer made by the defendant, and as soon as the plaintiff signed the instrument and delivered it to Nesbitt, this constituted an acceptance by the plaintiff, and thus there was a completed agreement, and the defendant could not afterwards withdraw from it: *Dominion Bank v. Knowlton*, 25 Gr. 125; *Merriam v. Calhoun*, 15 Neb. 569; Pollock on Contracts, 6th ed. 25-9; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 269-70. The only objection made by the defendant up to the commencement of the action, was as to the title, and the plaintiff is prepared to shew that the title is a good one.

Bicknell, contra. There is no question as to the law. The question is one of fact, namely, whether there was a completed agreement on the evidence or not.

The instrument here as found by the learned Judge, was merely an offer by the defendant. When defendant went to Nesbitt and made the offer of \$1,900 he had no authority from the plaintiff to enter into an agreement for the sale of the property at that price, and he so told the defendant, and that he would submit the offer to the plaintiff. What then took place merely amounted to an offer by defendant of the \$1,900, and before the defendant was notified of the acceptance by the plaintiff, the defendant withdrew, as he was entitled to do. The fact of the instrument being in form an agreement is in itself of no importance, the true character of the transaction must govern. The defendant went into the question of the title, but subject to his rights to question the validity of the contract.

Argument.

December 14th, 1895. ARMOUR, C. J. :—

The judgment of my learned brother is right and must be affirmed.

The instrument signed by the defendant and given by him to Nesbitt, although in the form of a mutual agreement was, until the acceptance thereof by the plaintiff, and notification of such acceptance given to the defendant, a mere offer, subject to withdrawal by the defendant.

In *Dickinson v. Dodds*, 2 Ch. D. 463, Mellish, L. J., at p. 473, said : " I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement."

Nesbitt was the agent of the plaintiff in procuring the

Judgment. offer from the defendant, and the notice of withdrawal
Armour, C.J. served on him by the defendant before the acceptance of
the offer by the plaintiff was notified to the defendant,
put an end to the offer.

I at first thought that Nesbitt might be treated as the agent of the defendant for the purpose of procuring the plaintiff's acceptance of the offer made by the defendant, and that his knowledge of the acceptance by the plaintiff, would bind the defendant, but Nesbitt's dealing with the defendant was as agent of the plaintiff, and the offer made by the defendant, was made to him as agent of the plaintiff; and I do not think that the facts in evidence are sufficient to warrant us in finding that in procuring the plaintiff's acceptance, he was acting as the agent of the defendant.

The appeal will, therefore, be dismissed with costs.

FALCONBRIDGE, J., concurred.

G. F. H.

[QUEEN'S BENCH DIVISION.]

SHAVER V. COTTON.

*Scire Facias—Company—Winding-up Act, R. S. C. ch. 129—Contributory
—Action against without leave of Court.*

There is nothing in the Winding-up Act, R. S. C. ch. 129, which makes it a bar, either expressly or by implication, to an action of *scire facias*, brought by a creditor of the company without the leave of the Court against a contributory.

Difference between the Imperial Companies Act, 1862, and the Winding-up Act of Canada pointed out.

Judgment of MEREDITH, J., at the trial reversed.

THIS was an action in the nature of a *scire facias* Statement. brought against the defendant, a shareholder in the Tribune Printing Company of Toronto Junction (Limited), to recover the amount, *pro tanto*, of an unpaid judgment recovered against the company.

The company had been duly incorporated by Letters Patent issued under the Great Seal of the Province of Ontario, pursuant to the Act entitled "An Act respecting the Incorporation of Joint Stock Companies by Letters Patent," bearing date the 11th day of March, 1892, and the defendant became a stockholder to the amount of five hundred dollars, no part of which was ever paid by him.

The plaintiff, on the 30th day of March, 1892, recovered judgment against the company for the sum of \$1,277.12 and costs, and on the 2nd day of April, 1894, a writ of execution was issued against the goods of the company, directed to the sheriff of the county of York, commanding him to levy the amount of the judgment and costs, which execution was on the 30th day of May, 1894, returned "no goods."

On the 3rd day of April, 1894, a winding-up order was made under the provisions of chapter 129 of the Revised Statutes of Canada, and chapter 32 of 52 Vict. (D.), upon the petition of the plaintiff, and under such order one R. S. McPhail became the liquidator, but took no proceedings under the order.

Statement. On the 13th day of June, 1894, this action was commenced, and was tried at the non-jury sittings in Toronto on the 30th April, 1895, by MEREDITH, J., by whom the following judgment was given :—

MEREDITH, J.—“I give leave to the plaintiff to add (with his consent), in the manner required by the Consolidated Rules, the liquidator of the company as a co-plaintiff within one week, and in the event of that being done, let judgment be entered herein for the plaintiff against the defendant for the amount in question, with interest and costs, the sum recovered to be applied by the liquidator as assets of the company in the winding-up proceedings; in the event of such amendment not being made, let the action be dismissed with costs.”

And on the 14th day of May, 1895, the learned Judge gave the following supplementary judgment :

“Plaintiff having failed to amend, as above provided, on his application to extend time for so doing, I direct that judgment be entered dismissing the action without costs, but without prejudice to any proceedings under the Winding-up Act to enforce the claim against the defendant.”

The plaintiff moved on notice for an order setting aside that portion of the findings and judgment of the learned trial Judge whereby he directed judgment to be entered for the defendant against the plaintiff with costs, unless the consent of Richard Stuart McPhail, the liquidator of the said company to be joined as a party plaintiff in this action should be filed within one week from the date of the trial of the action; and for an order that the judgment be entered herein for the plaintiff against the defendant, with full costs of the action, or for a new trial, or that the time for filing the consent of the liquidator to be made a party plaintiff be extended, or for such further or other order as the nature or merits of the case may require, upon the following grounds: (1) that that portion of the said

findings and judgment directed to be entered appealed from was contrary to the law and evidence, and the weight of evidence; (2) that upon the law and evidence judgment ought to have been entered for the plaintiff unconditionally; (3) that the defendant had interfered to prevent the said consent being obtained within the time limited by the learned trial Judge; and he filed the consent of the liquidator R. S. McPhail to be added as a party plaintiff in this action. Statement.

In Michaelmas Sittings, November 18th, 1895, before a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE, J., *Titus* supported the motion.

Raney shewed cause.

December 23rd, 1895. ARMOUR, C.J.:—

The evidence shewed, and the learned Judge found, that the defendant was a shareholder in the company to the amount of five hundred dollars, no part of which had ever been paid; that the plaintiff had recovered judgment against the company for the sum of \$1,277.12, and that an execution against the company had been returned wholly unsatisfied.

The plaintiff therefore became entitled to recover from the defendant the sum of five hundred dollars, being the amount of stock held by him in the company and unpaid.

The winding-up order is pleaded as a bar to this action, but there is nothing in the Winding-up Act which makes it a bar either expressly or by necessary intendment.

The Winding-up Act contains no similar provision to section 198 of the Imperial Companies Act of 1862 prohibiting the bringing of an action after the making of the winding-up order against any contributory without leave of the Court, nor any provision which can be properly construed to create such a prohibition.

We are not called upon to determine upon this motion whether we would have jurisdiction upon the equity of the Winding-up Act to stay this action.

Judgment. The cases decided upon the Imperial Winding-up Act, **Armour, C.J.** and prior to the Imperial Companies Act of 1862, 7 & 8 Vict. ch. 111; 11 & 12 Vict. ch. 45; 12 & 13 Vict. ch. 108; 19 & 20 Vict. ch. 47; 20 & 21 Vict. ch. 14, and 21 & 22 Vict. ch. 60, make such a jurisdiction questionable: *Lindley's Law of Companies*, 5th ed., 611.

But even if we had power to stay it we would only do so upon payment of the amount of stock to the liquidator, and of the costs to the plaintiff. If we deemed it necessary to do so we would direct the liquidator to be now added, extending the time for doing so allowed by the learned Judge, and would restore his original judgment.

Judgment will therefore be entered for the plaintiff against the defendant for five hundred dollars, with full costs of suit.

FALCONBRIDGE, J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

TRUSTS CORPORATION OF ONTARIO V. HOOD ET AL.

Principal and Surety—Assignment of Mortgage—Covenant—Construction—Extension of Time—New Mortgage—Reservation of Rights—Agreement—Parol Evidence.

A covenant by the assignor with the assignee in an assignment of mortgage that the mortgage moneys shall be duly paid makes the assignor a surety for the mortgagor as to such payment.

Darling v. McLean, 20 U. C. R. 372, followed.

Gordon v. Martin, Fitz-G. 302, and *Guild v. Conrad*, [1894] 2 Q. B. 885, distinguished.

On the maturity and non-payment of a mortgage, the grantee of the equity of redemption, who had covenanted with the mortgagor to pay the mortgage moneys, executed a new mortgage to the holder, through several mesne assignments, of the original mortgage, the new mortgage extending the time for payment of the principal and reducing the rate of interest, the mortgagee refusing to discharge the original mortgage, and verbally reserving his rights against the assignor to him of that mortgage, who had covenanted that the mortgage moneys should be paid :—

Held, that parol evidence of the reservation of rights against the surety was admissible :—

Held, also, that owing to the reservation of rights against the surety the extension of time given by the new mortgage did not interfere with the right of the surety to proceed against the original mortgagor.

THE plaintiffs sued, as executors of the late William Charles McLeod, to recover from the defendants, as executors of the late John D. Hood, the amount unpaid upon a mortgage made by Philander Slaght to Thomas J. Clarke, which Clarke assigned to Hood, and the latter assigned to McLeod by deed dated the 9th June, 1878, covenanting with McLeod that the mortgage money and interest in the mortgage mentioned should be duly and regularly paid; and the action was brought on this covenant. Statement.

The defence set up was that Hood became, as a result of the transaction between McLeod and him, a surety for the mortgagor for the payment of the mortgage money and interest, and that the time for payment of the mortgage money had been extended without his consent, and that he was thereby released from his liability on the covenant.

Statement. The action was tried before ARMOUR, C. J., at the Autumn non-jury sittings at Woodstock, 1895.

The evidence shewed that Slaght, the mortgagor, had conveyed his equity of redemption to one Wood, the latter assuming and covenanting with him to pay the mortgage debt and interest; that after the time for payment of the mortgage had expired, and the whole of the mortgage moneys were in arrear, Wood applied to McLeod to reduce the rate of interest from eight per cent.—which was the rate payable according to the terms of the mortgage—to six and a-half per cent., which McLeod agreed to do, and that thereupon a new mortgage was given by Wood to McLeod to secure the principal money, which was made payable in four years from the date of the mortgage, with interest at the reduced rate agreed on, payable half-yearly; that no discharge or release of the Slaght mortgage was given by McLeod, he, according to the evidence of Wood—which was uncontradicted—refusing to release it, giving as his reason for not doing so, that “he intended to hold on to Hood,” or, as put by Wood in his cross-examination, saying that “he would reduce the interest because he had no hold on him (Wood) on the first mortgage, and that he (McLeod) would still hold on to Hood for the deficiency.”

ARMOUR, C. J., dismissed the action with costs.

The plaintiffs appealed, and their appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 27th November, 1895.

Aylesworth, Q. C., for the plaintiffs, contended that Hood did not stand in the position of a surety, and that even if he did, the extension of time that was given did not operate to release him from the covenant, because McLeod had, he contended, in giving the extension, reserved his rights against Hood. He referred to Baylies on Sureties, sec. 8; *Gordon v. Martin*, Fitz-G. 302; *De Colyar on Guarantees*, 2nd ed., p. 105; *Lakeman v. Mountstephen*, L. R. 7 H. L. 17; *Guild v. Conrad*, [1894] 2 Q. B. 885; *Birkmyr v. Dar-*

nell, 1 Salk. 27; *Little v. Edwards*, 69 Md. 499; *James v. Balfour*, 7 A. R. 461; *Re Hoyle*, [1893] 1 Ch. 84; *Hollier v. Eyre*, 9 Cl. & F. 1; *Corrigal v. Boulton*, 17 U. C. R. 131; *Currie v. Hodgins*, 42 U. C. R. 601.

W. M. Douglas, for the defendants, contra, cited *James v. Balfour*, 7 A. R. 461; *Hoener v. Merner*, 7 O. R. 629; *Bolton v. Buckenham*, [1891] 1 Q. B. 278; *Ryan v. McKerrall*, 15 O. R. 460; *Bristol and West of England Land Co. v. Taylor*, 24 O. R. 286; *Bolton v. Salmon*, [1891] 2 Ch. 48; *Mercantile Bank of Sydney v. Taylor*, [1893] A. C. 317; *Keuys v. Emard*, 10 O. R. 314, 319; *Mathers v. Helliwell*, 10 Gr. 172; *Aldous v. Hicks*, 21 O. R. 95; *Polak v. Everett*, 1 Q. B. D. 669; *Holliday v. Hogan*, 20 A. R. 298, 22 S. C. R. 479.

January 11, 1896. MEREDITH, C. J. (after setting out the facts as above):—

I do not think that the first objection is entitled to prevail. Hood was, in my opinion, a surety for Slaght for the payment of the mortgage money and interest. His covenant was, in effect, a covenant that Slaght would pay in accordance with the terms of the mortgage. This was a covenant to answer for the debt or default of Slaght. A surety is one who promises to answer for the debt, default, or miscarriage of another, and Hood, I think, comes clearly within that definition.

The case of *Darling v. McLean*, 20 U. C. R. 372, is conclusive against this contention of the defendants. There the covenant of the assignor was contained, like the covenant in this case, in the assignment of a mortgage, and, though the form of it was somewhat different, it was in substance the same as that upon which this action is founded, and the Court was of opinion that it was plain that the covenantor stood in the position of a surety for the mortgagor.

The covenant in this case is not like the promise in *Gordon v. Martin*, Fitz-G. 302, which was that a third party should

Judgment.
Meredith,
C.J.

pay a sum of money, because in that case there was no liability of the third party, and the promise was treated as if it had been that of the promissor himself to pay; and, as was said, the act done which formed the consideration for the promise was on his credit, and no way upon the third party's. Nor is it like the promise in such cases as *Guild v. Conrad*, [1894] 2 Q. B. 885, which was held to be a promise to indemnify the plaintiffs against the liability which they undertook on the faith and in consideration of the promise, and not a promise that the person whose bills they accepted—the acceptance being the liability they undertook—would pay them; that, as was pointed out, would have been clearly a promise to answer for the debt or default of another. It was like a promise to a debtor to indemnify him against the payment of his debt, which has always been held not to be a promise to answer for the debt or default of another within the meaning of the 4th section of the Statute of Frauds.

The first objection, therefore, fails.

I have had more doubt about the second objection, but have come to the conclusion that it is well founded.

There is no specific finding of the learned Chief Justice as to what the arrangement between McLeod and Wood as to the taking of the mortgage of the latter was; but the result of the evidence is, I think, to establish that the agreement was that the taking of the Wood mortgage should not operate as a satisfaction of the mortgage from Slaght; and that, notwithstanding the giving of, and the extension of time for payment which was effected by, it, the rights of McLeod against Hood should be reserved.

In the absence of an agreement to the contrary, the taking of the Wood mortgage would have operated to extend the time for payment of the mortgage money; and, even though the Slaght mortgage had been kept on foot, the case of *Bolton v. Buckenham*, [1891] 1 Q. B. 278, shews that the effect of such a transaction is to discharge the surety.

It is equally clear that a creditor may prevent the ex-

tension of time granted by him to the debtor having the effect of discharging the surety by expressly reserving his rights against the surety—and, as McLeod, according to my view of the evidence, did reserve his rights against Wood, the extension of time given by the Wood mortgage did not operate to discharge Hood from his liability on his covenant: *Currie v. Hodgins*, 42 U. C. R. 601, and cases cited for this proposition at p. 608.

Judgment.
Meredith,
C.J.

It was objected on the part of the defendants that parol evidence was not admissible to shew that the agreement was that McLeod's rights against Hood should be reserved, as such evidence, it was urged, contradicted the terms of the mortgage, which contained no provision of that kind.

The case of *Currie v. Hodgins*, just referred to, is against this contention of the defendant, and is an express decision that parol evidence of such a reservation is admissible in such a case as this. That was a decision of the full Court of Queen's Bench, which we ought to follow. In arriving at its conclusion the Court relied on and followed the decisions in several English cases, and amongst others, *Wyke v. Rogers*, 1 DeG. McN. & G. 408, and *Boaler v. Mayor*, 19 C. B. N. S. 76, which appear to me to have justified that conclusion.

Bristol & West of England Land Co. v. Taylor, 24 O. R. 286, was relied on by the defendants as establishing that the reservation by McLeod of his rights against Wood was of no avail; but in that case the Court said that the provision of the agreement reserving the right of the creditors against the surety was effectual as regards the extension of time, and decided in favour of the surety on the ground that a new agreement had been entered into between the debtor and the creditor, not only extending the time for payment, but making a material alteration in the original contract by increasing the rate of interest which the debtor was to pay, and it was this latter provision that, as the Court held, had the effect of discharging the surety.

It was suggested in the course of the argument that, as

Judgment,
Meredith,
C. J.

there was no reservation of the rights of McLeod against the mortgagor Slaght, the surety was discharged, the suggestion being that, as Slaght became after his conveyance to Wood a surety for the latter, he was, in the absence of any reservation of McLeod's rights against him, discharged, and, as a consequence of this, Hood was also discharged, because, upon payment by him of the mortgage debt, he could not get what he was entitled to receive from the creditor—the security for the debt which he had guaranteed, unimpaired. This objection I at first thought a formidable one, but further consideration has led me to the conclusion that it is unfounded, and for this reason. McLeod reserved his rights against Hood. What is the fair meaning of that? Is it not that he stipulated that the taking of the Wood mortgage was not to operate so as to effectuate anything that should prevent his looking to Hood for payment of the mortgage and interest because of the default of Slaght in paying according to the terms of his mortgage? If it was necessary to that end that Slaght's liability to pay should not be impaired—the new agreement was not to impair it. If it was necessary that the extension of time for payment should not interfere with Hood's right to proceed on the covenant in the mortgage and against the mortgaged lands at any time on paying to McLeod the amount due him on the Slaght mortgage—that too was not to be affected. That, it seems to me, is the fair meaning of the reservation.

Upon the whole, I come to the conclusion that the surety is not discharged; and the appeal should, therefore, be allowed with costs, and the judgment of the learned Chief Justice reversed, and judgment should be entered for the plaintiffs for the amount due on the Slaght mortgage with interest and costs of suit.

ROSE, J.:—

I agree.

E. B. B.

[QUEEN'S BENCH DIVISION.]

FARWELL ET AL. V. JAMESON.

Landlord and Tenant—Distress for Rent—R. S. O. ch. 143, sec. 28, sub-sec. 3.

A person who goes into actual occupation of premises, under a lease from the agent of a tenant, believing the former to have, but who has not, authority from his principal to let the premises, is in under the tenant within the meaning of sub-section 3 of section 28 of the Landlord and Tenant Act, R. S. O. ch. 143, and his goods are liable to distress by the superior landlord.

THIS action was brought by the plaintiffs against the defendant to recover damages for the distress of certain pianos, cases, organs and stools under a landlord's warrant; the plaintiffs' contention being that although in occupation of the premises they were not in occupation either as tenants or sub-tenants to, nor under the tenant within the meaning of sec. 28 of ch. 143, R. S. O. Statement.

The defendant justified as landlord of the premises and alleged that the plaintiffs were tenants within the meaning of the said section.

The action was tried on 8th November, 1895, at the non-jury Sittings at Osgoode Hall, before ARMOUR, C. J., by whom the following judgment was delivered:

J. K. Kerr, Q. C., for the plaintiff.

Laidlaw, Q. C., and *Kappelle*, for the defendants.

November 11th, 1895. ARMOUR, C. J.:—

The facts are very simple, and the question is a very narrow one.

It is admitted that the defendant is the owner of certain premises on Queen street, Toronto, leased by him to one Armstrong; that Armstrong assigned the lease to the London and Canadian Loan Company, that the plaintiffs on the 17th April, 1895, had certain pianos, organs, etc., therein which were their property; that for certain rent due under the lease the defendant distrained on the pianos on the 17th of April, and sold them; that before the sale

Judgment. the defendant had notice that the plaintiffs claimed the Armour, C.J. chattels.

It appears that the London and Canadian Loan Company were in possession of the premises as mortgagees, or at all events as assignees; that they had sanctioned the putting up in the premises a notice that the premises were to let and to "apply to William Parsons, agent." They had also entrusted Parsons with the key for the purpose, as I understand it, of shewing the premises to proposing lessees.

Parsons, it appears to me from the evidence, had the authority to use the keys for the purpose of shewing proposing lessees the premises, and he had also the authority of procuring proposing lessees and bringing them to the London and Canadian Loan Company, but he had no authority to make a lease. He had only authority to procure proposing lessees, and to bring them to the London and Canadian who would determine whether in point of fact they would grant a lease to the proposing lessees or not.

These being the circumstances, the plaintiffs went to Parsons for the purpose of seeing the premises, and of procuring a lease from him as the agent of the loan company, and the lease which is produced was entered into:

"TORONTO, Ont., April 1st, 1895.

"It is hereby agreed by and between Farwell & Glendon and W. Parsons, that the said F. & Glendon may have the use of store No. 221 Queen street east, for the purpose of storing pianos, for the sum of \$5.00 per month, to be rented merely from month to month, and to vacate immediately on notice from said Parsons.

"Rent to commence from above date.

"(Sgd.) FARWELL & GLENDON.

"(") WM. PARSONS."

This lease was drawn up by Mr. Farwell, dated in April, and professes to be made between Parsons and the plaintiffs.

It, however, seems clear that the plaintiffs knew that

Parsons was acting merely as agent for the London and Canadian Loan Company, and they took the premises from him as such agent, although the lease professes to be in the name of Parsons. After they moved their pianos and organs into the premises and were occupying it, the defendant Jameson, the supreme landlord, came and distrained. Judgment.
Armour, C.J.

Now the question is, whether the goods were liable to distress for rent; and that turns upon sub-sec. 3 of sec. 28 of the Landlord and Tenant Act, R. S. O. ch. 143, which provides that the word "tenant" shall include "sub-tenant * * * and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease."

It is quite clear the plaintiffs were in actual occupation of the premises. The question is, whether they were in actual occupation of the premises under the London and Canadian Loan Company?

The statute provides for two cases. "Any person in actual occupation of the premises under or with the assent of the tenant." It would seem to indicate that the statute contemplated a person being in under another without being in with his assent, because it provides that if a person is in actual occupation of the premises under the tenant that his goods may be distrained on. Then it goes on to say, "or with the assent of the tenant." If a person was in actual occupation with the assent of the tenant, of course he would be in under the tenant, so that it seems to have contemplated under the tenant without the tenant's assent.

I think that the effect of the transaction here is that the plaintiffs, having leased from Parsons as an agent, believing him to be the agent of the London and Canadian Loan Company, must be taken to be in under that company.

Take the case of a person having a power of attorney to lease lands during the appointor's absence from the country. After the appointor returns, the attorney leases the premises. Then, is the lessee in under the landlord? I should say he was in under the landlord.

One of the ways of testing it would be, supposing an

Judgment. action of ejectment were brought—supposing these plaintiffs remained in possession and an action of ejectment were brought by the London and Canadian Loan Company against them. All that would be necessary, in my view, to prove would be that the plaintiffs entered under this lease, made by Parsons, assuming to act for the company, and the company upon shewing that Parsons had no authority, would be entitled to eject. I do not think that under those circumstances the plaintiffs could say, “You have proved us to be in without any authority from you; we are, therefore, trespassers, and we are strangers to you, and you must prove your title.”

Take the case of a property in which there might be a good deal of difficulty in proving title, someone having entered by defective authority of an agent, could he then put the landlord to proof of his title? Would it not be quite sufficient to shew the fact that he had gone in under a person who professed to be the agent of the landlord, but who had not sufficient authority?

I think that these plaintiffs were in clearly under the London and Canadian Loan Company, and their goods were rightly seized for distress, and that therefore the action must be dismissed with costs.

It may seem hard that their goods should be seized, but of course they have their remedy; as I understand the law the persons who ought to pay the rent are bound to indemnify the persons whose goods have been seized.

I will stay the proceedings.

During the Michaelmas Sittings of the Divisional Court, the plaintiffs moved by way of appeal against this judgment upon the ground that the learned Chief Justice should not have found that the plaintiffs had notice that Parsons was the agent of the London and Canadian Loan and Agency Company, and upon the further ground that the plaintiffs were not “tenants” of the defendant within the meaning of sec. 28 of ch. 143, R. S. O., as interpreted by sub-section 3 of that section.

The motion was heard before the Divisional Court, *Argument.* composed of FALCONBRIDGE and STREET, JJ., on 29th November, 1895.

Laidlaw, Q.C., for the motion. The plaintiffs were not in "under" the company within the meaning of sub-sec. 3, sec. 28 of The Landlord and Tenant Act, R. S. O. ch. 143. The evidence does not support the finding of the Chief Justice that the plaintiffs knew Parsons was an agent of the company. The company had not sanctioned the lease, and the plaintiffs went in under Parsons, who had no authority, and they were consequently simply trespassers. The plaintiffs were not "sub-tenants" or "assigns" of the tenant. "With the assent of the tenant" does not arise here. "Under" is through, claiming under, and refers to a chain of title.

Geo. H. Kilmer, contra. It is admitted the company were assignees of the lessee. The letter of the plaintiffs' solicitors to the company referring to "an agent of yours, Mr. Parsons," proves the knowledge by the plaintiffs of the company's title. The possession, which should always be considered rightful, was actual, and they were in "under" the company, and the trial Judge has so found. The onus is on the plaintiffs to prove their case, and that would prove them to be trespassers. As against us, they cannot set up want of authority in the agent. They submitted to the distress, and did not replevy. I refer to *Fleming v. Gooding*, 10 Bing. 549; *Delaney v. Fox*, 2 C. B. N. S. 768, at 774; *Doe d. Batten v. Murless*, 6 M. & S. 110; *Re Defoe*, 2 O. R. 623; *Re Dunham*, 29 Gr. 258; *Gray v. Richford*, 2 S. C. R. 431; *Cooper v. Blandy*, 4 Moore & Scott, 562, 569, 571; *Panton v. Jones*, 3 Camp. 372; *Doe d. Hindly v. Ricarby*, 5 Esp. 4. Even if sec. 4, ch. 26, 58 Vict. (O.), affects the right of distress it is not retrospective, and does not apply to this case: *McAreevy v. Hannan*, 13 Ir. C. L. R. 70.

Laidlaw, in reply.

Judgment. December 31, 1895. STREET, J.:—

Street, J.

The letters from Messrs. Laidlaw & Co. to the London & Canadian Loan Company, and to the solicitors for the defendants, written, as the plaintiff Farwell says they were, by his instructions and from information furnished by him, are evidence supporting the finding of the Chief Justice that the plaintiffs rented the premises from Parsons as agent for the company, the assignees of the lease and head tenants of the defendant. The plaintiffs appear from these letters to have been aware that Parsons was not himself the owner, but that he was acting merely as agent for the owners, and that his principals were the London and Canadian Loan Company.

The language of the Act, sec. 28, ch. 143, R. S. O., in defining the meaning of the word "tenant" for the purposes of this section appears intended to include every person in occupation of the property who had got there in any way by virtue of the title passing under the lease to the original tenant however it might be sub-divided; and to exclude only persons found in occupation under an adverse title.

The plaintiffs here obtained the keys from the person, who held them as caretaker for the London and Canadian Company, and accepted a lease from the person they believed to be acting for the company, and paid rent to him. They went into possession, believing themselves to be tenants to the company, and they were under that belief down to the time their goods were seized by the defendant.

The way to test the question whether they were in "under" the company or not is to consider what rights they would have been allowed to set up if the company had brought an action against them to recover possession. Could they have set up title in themselves, however good it might have been, as an answer to the action?

I think the question is answered by *Doe d. Johnson v. Baytup*, 3 A. & E. 188, in the negative. In that case the

lessor of the plaintiff being owner of a house and garden, put up a notice that it was to let, with a reference to one Mary Batscomb, with whom she left the keys of the house and garden in order that the house might be shewn to persons applying to see it. The defendant, who claimed title to the property adversely to the lessor of the plaintiff, borrowed the keys under the pretence of taking some vegetables from the garden, and having by means of the keys got into the house and garden, refused to go out again. It was held that having entered by leave of the party in possession she could not set up her adverse title, but was bound to deliver up the premises before she could be allowed to contest the title of the lessor of the plaintiff, and that there was no distinction in this respect between a tenant and a mere licensee.

Judgment.
Street, J.

That case is referred to and considered in the late case of *Tadman v. Henman*, [1893] 2 Q. B. 168, in which the wife of the tenant had left upon the premises, by his leave, a hearse belonging to her as her separate estate, and it was held that she was not estopped from disputing the landlord's title to distrain, because the license was merely to leave the hearse upon the land, and did not confer upon her any possession of or interest in the land; and the case is distinguished upon this ground from *Doe d. Johnson v. Baytup*. It appears to me that the only reason why the defendant in *Doe d. Johnson v. Baytup* could not set up her own title was because, having entered by the leave of the caretaker of the owner, although without any authority from the owner, she was in "under" the owner, and was deemed still to be in "under" the owner so long as she continued the same possession.

The estoppel is based not on the title obtained by the lessee or licensee, but on the possession which he obtains by the lease or license, and therefore it does not cease upon the termination of the interest obtained by the lessee, or on the revocation of the license of the licensee, but upon the giving up of the possession which has been obtained under the lease or license: *Doe v. Mills*, 2 A. & E. 17;

Judgment. *Doe d. Knight v. Smyth*, 4 M. & S. 348; *Pyatt v. McKee*, 3 O. R. 151. See also an article dealing with the subject of the estoppel of a tenant to deny his landlord's title in vol. 6 Am. Law Review, p. 1 (Oct. 1871); *Doe d. Marlow v. Wiggins*, 4 Q. B. 367.

Street, J.

I cannot see how the action of the London and Canadian Loan Company taken after the levying of the distress can alter the defendant's rights. The plaintiffs plainly entered into possession "under" the London and Canadian Loan Company within the meaning of the authorities, and so remained down to the time of the seizure. It appears to me that they cannot get rid of the consequences of having done so, by saying that they have found out after the seizure, that the authority under which they took possession was defective, and that they wish to retrace the steps they took. Either they must be allowed to do so with the result that the defendant must be held to have been a trespasser *ab initio*, and liable in damages for the seizure, or they must bear the consequences of having entered into possession of the premises without exercising proper caution.

In my opinion the plaintiffs were in occupation of these premises "under" the London and Canadian Loan Company at the time of the seizure within the meaning of the Act, and their goods were therefore distrainable by the defendants; and the motion should therefore be dismissed with costs.

FALCONBRIDGE, J. :—

I find myself obliged to concur in the judgment of my brother Street, and I do so with the less reluctance because the plaintiffs have, I think, their remedy against those who ought to have paid the rent. See *Edmunds v. Wallingford*, 14 Q. B. D. 811, decided [a year after *Herring v. Wilson*, 4 O. R. 607, and questioning *England v. Marsden*, L. R. 1 C. P. 529, on the authority of which the judgment in *Herring v. Wilson*, was mainly based.

G. A. B.

[CHANCERY DIVISION.]

GARING ET AL. V. HUNT AND CLARIS.

*Lien—Mechanics' Lien—Repairs by Lessee—Interest of Lessor—"Owner"
—Scenic Artist.*

The lessor in a lease which provides that certain repairs shall be done by the lessee and the cost deducted from the rent is not, as regards persons employed to do such repairs, an "owner" within the meaning of sub-section 3 of section 2 of R. S. O. ch. 126, the Mechanics' Lien Act.

Seemle, a scenic artist is not a "mechanic, labourer, or other person, who performs labour, etc.," under section 6 (1) of the Act.

Quere, whether movable scenery and flying stages in a theatre are part of the freehold.

THIS was an appeal from a decision of the Local Master Statement at St. Thomas in a mechanic's lien proceeding.

The defendant Claris was the owner of an opera house in the city of St. Thomas which he had leased to the defendant Hunt for five years by a lease in writing in which the tenant agreed to do certain repairs, he being allowed for them in the rent.

The tenant had employed the two plaintiffs, who were scenic artists and who had, in fulfilment of the terms of the lease, performed certain work in the opera house, the major portion of which was painting scenes which ran in and out in grooves on the stage and were removable, and a small portion was for painting panels on the boxes and proscenium arch.

The evidence was conflicting, the plaintiffs testifying that the defendant Claris had undertaken to see them paid, which Claris denied.

On this the Master found that Claris was not liable.

From this finding the plaintiffs appealed, and the appeal was argued at London, on November 26th, 1895, before FALCONBRIDGE, J.

C. F. Maxwell, for the plaintiffs. Claris was an "owner" within the meaning of sub-sec. 3, sec. 2, R. S. O. c. 126,

Argument. because the arrangement under which the tenant Hunt was to repair was a contract independent of the lease, and as he was being paid for the repairs he made them as a contractor and not as a lessee: Phillips on Mechanics' Liens, 3rd ed., 161, 163. This case differs from *Graham v. Williams*, 8 O. R. 478, and 9 O. R. 458, where the arrangement was a mere license, not a contract. The plaintiffs are entitled to liens as wage earners under sec. 6, (1) of the Act. The scenes were fixtures. The terms of the lease make them permanent improvements, and they were to be treated as part of the building, and the intention governs: *The Scottish American Investment Co. v. Sexton*, 26 O. R. 77; *Keeffer v. Merrill*, 6 A. R. 121; *Stevens v. Barfoot*, 13 A. R. 366; *Thomas v. Inglis*, 7 O. R. 588; *Carson v. Simpson*, 25 O. R. 385. Many easily removable things are fixtures: Brown's Law of Fixtures, 4th ed., 105, 109.

J. A. Robinson, for defendant Claris. The law is settled in *Graham v. Williams*, 8 O. R. 478, 9 O. R. 458. The property was leasehold and, under sub-sec. 2, sec. 5, the consent of the owner must be obtained to make him liable. Scenic artists are not mechanics or labourers: sec. 6, (1). The lease only provides for permanent improvements.

December 30th, 1895. FALCONBRIDGE, J.:—

I am of the opinion that Claris is not the "owner" whose interest may be charged within the meaning of R. S. O. ch. 126, sec. 2, sub-sec. 3.

The estate or interest charged by the lien is leasehold and is that of Hunt, and the fee simple may, by sec. 5, sub-sec. 2, with the consent of the owner thereof, be subject to said charge provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof, and duly verified.

There is no such consent here, and the clause in the lease about repairs to be done to the premises will not avail the plaintiffs.

Nor can such clause avail to make defendant Hunt a

contractor with defendant Claris, nor to make plaintiffs Judgment.
sub-contractors under defendant Hunt. Falconbridge,

If it were necessary for the decision of the case I should hold on the principle of *ejusdem generis* that a scenic artist was not a "mechanic labourer or other person who performs labour," etc., under sec. 6, (1) of the Act.

In Pennsylvania the movable scenery and flying stages have been held to be not part of the freehold, nor subject to the lien: *The Olympic Theatre*, 2 Browne Pa, 275, cited in Ewell on Fixtures, p. 288, note 3.

The learned Master was quite right.

The appeal will be dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

RE CANADA COAL COMPANY.

DALTON'S CLAIM.

Landlord and Tenant—Acceleration Clause—Expiry of Lease—Reduction of Rent—Application of Provisions of Old Lease.

A company were assignees of a lease in writing containing a provision for the acceleration of six months' rent in case the tenant became insolvent. Before the expiry of the lease an arrangement was made between the company and the landlord for a reduction of the rent after the expiry of the lease, nothing being said as to the other terms:—

Held, that the arrangement made imported the terms of the old lease, so far as applicable, including the acceleration clause.

THIS was an appeal from a judgment of the Master-in- Statement.
Ordinary, disallowing in part, the claim of the landlord of the Canada Coal Company in liquidation.

Charles C. Dalton was the owner of the premises occupied by the company, who held as assignees of a lease in writing made in pursuance of the Short Forms Act and in which there were special provisions, at a rental of \$2,000 a year, and in which lease was contained the pro-

Statement. vision in case of bankruptcy or insolvency of the lessee that "the then current and the next current quarter's rent shall immediately become due and payable and the said term shall immediately become forfeited and void."

Previous to the expiry of this lease, the company arranged verbally with Dalton that the rent should be reduced from \$2,000 to \$1,200 a year, nothing being said as to the other terms and they remained on after the expiration of the lease, paying rent as before, but at the reduced amount.

When the company was put into liquidation, the landlord sought to prove a claim of \$600 for the two quarter's rent under the clause in the lease referred to.

The Master disallowed the claim, on the ground that what took place at the time of the reduction of the rent was a new demise or contract of letting, and that the terms of the old lease formed no part of the new tenancy.

From this ruling, the landlord appealed, and the appeal was heard on November 26th, 1895, before MEREDITH, J.

Shepley, Q.C., for the appeal. Upon the new agreement, the rent was reduced, but the other terms of the lease remained as they were. The law is clearly laid down in *Digby v. Atkinson*, 4 Camp. 275; and *Doe d. Monck v. Geekie*, 5 Q. B. 841. See also *Phillips v. Miller*, L. R. 10 C. P. at p. 423; and Foa's Law of Landlord and Tenant, 2nd ed., 302.

Biggs, Q.C., for the liquidator. When the new arrangement was made as to the amount of the rent no agreement was made that any of the conditions of the old lease should attach to the new term. The Master has found on the evidence that there was a new lease between the parties, and that will not be disturbed. The landlord never attempted to take advantage of any forfeiture clause, but allowed the liquidator to take possession.

Shepley, Q.C., in reply. The liquidator's possession was by arrangement. (Stopped by the Court.)

MEREDITH, J. :—

Judgment.

Meredith, J.

The question before the Master was, and on this appeal is, one of fact : What was the agreement ?

Ordinarily a finding of fact is hardly interfered with ; but here the Court is in as good a position to consider the question as the Master was ; the case is rather one of the proper inference to be drawn from the facts.

The company were in under a lease containing certain definite provisions. Just before the expiry of that lease a new arrangement was come to, the company desiring to continue as tenants, just as before, to avoid the expense and trouble of moving, if the rent were reduced. The old term was ending and a new term sought and agreed upon. If the old lease were not the basis of the new one, what was ? What property was demised ? And on what terms and conditions ? It surely was simply the old lease for a new term at a reduced rental.

Nothing was said because the old lease settled the terms and they were satisfactory to both parties ; all that was sought was a reduction of the rent. There must have been something behind what took place ; and that must have been the old lease. That is the common sense view of the matter, and no authority is needed to support it.

The contract made related to the old lease, and its terms were to be imported as far as applicable. The provision in question was not only applicable but usual, appearing in nearly all the printed forms of leases so generally used.

The appeal must be allowed. The Master will deal with the claim as if the provision in question were applicable ; that is the only question arising upon this appeal. I have not to deal with the effect of such a finding.

The respondent must pay the costs of the appeal.

G. A. B.

[CHANCERY DIVISION.]

GARLAND V. THE CORPORATION OF THE CITY OF TORONTO.

Master and Servant—Workmen's Compensation for Injuries Act, 1892—55 Vict. ch. 30 (O.), sec. 3, sub-sec. 3—Negligence of Person to whose Orders Workmen bound to Conform—Custom of Business.

The plaintiff was injured in using a derrick in connection with the construction by the defendants of a building. It appeared that the custom or manner of conducting the work was that the oldest man working on the derrick was understood to be in charge of it, and A. being such oldest man and having been ordered by the foreman of the stone branch so to lift a stone which had by the foreman's orders been prepared in a particular way for lifting with "dogs," directed the plaintiff to assist in lifting the stone with the "dogs," instead of having it wrapped in chains as would have been proper, and the stone fell and injured the plaintiff:—

Held, that A. was a person in the service of the employer to whose orders the plaintiff "was bound to conform and did conform" within the meaning of 55 Vict. ch. 30, sec. 3 (O.), sub-sec. 3.

Statement.

THIS was an action brought by Samuel Garland against the Municipal Corporation of the city of Toronto, for damages for injuries sustained while in the employ of the defendants under circumstances so far as material to this report, as alleged by the plaintiff in his statement of claim, as follows:—

The defendants under their corporate powers were engaged on September 20th, 1893, in erecting within their municipal limits a building to be used as a Court House, and engaged the plaintiff to work on the building as a day labourer: one Alfred Amory was also employed by the defendants to work at the building, and was entrusted by them on the day mentioned with the superintendence of the work of lifting, by means of a derrick, stone intended for the construction of the buildings, into wagons for the purpose of being drawn into a shop to be dressed before being placed into the walls of the building, and it was the duty of the plaintiff to aid in such work under the instruction and superintendence of Amory, who, in his turn, was under the direction of one Alexander Marshall* in the

*As appears from the judgment of Boyd, C., Marshall was the head stone cutter, and was foreman over the whole work of the stone branch, and gave instructions for the lifting of the particular stone which did the injury.—RER.

employ of the defendants on the buildings, and who gave **Statement.** directions that the stone should be raised in the following manner: A long chain was suspended from the outer end of the boom of the derrick, to the lower end of which was fastened another by both its ends, which last mentioned chain ran through two loops or holes of two iron or steel hooks called "dogs," the points of which were fastened one to each end of the block of stone by being inserted in cavities in the stone made for that purpose. The stone was then, by means of the boom, chain, and dogs, raised on to the wagon, the stone above the dogs sustaining the whole weight of the block. While the plaintiff was engaged in working under Amory in fastening the dogs, and otherwise aiding in loading a large block of freestone on the day mentioned, in the manner aforesaid, it broke away from the dogs whilst suspended in the air, and fell on one of the plaintiff's feet, and crushed and seriously and permanently injured it; the falling of the stone was owing to the defect in the arrangement of the derrick, in the following respect: the stone was too heavy to be raised in manner above described by dogs, and should have been secured in some other manner, such as by means of chains or iron ropes tied round the stone to prevent it from falling. In consequence of the great weight of the stone the dogs tore channels through the stone above them, by reason of which the stone dropped as aforesaid: the said defect in the arrangement of the machinery was owing to the negligence of the defendants and Amory, and also of Marshall: Amory was also guilty of negligence in ordering the stone to be lifted in the manner aforesaid, instead of first causing it to be properly secured before raising it: the plaintiff in fastening the dogs in the stone and holding on one end of the rope as hereinafter mentioned, was bound to conform and did conform to the orders and directions of Amory: another act of negligence of the defendants which contributed to the accident complained of was the improper construction of the derrick in the following respect: The mast thereof was not upright as it should have been, but

Statement. leaned many inches to the south, thus causing the boom, with the stone, to swing in that direction, whereas it was necessary, in order to place it where the defendants required it to be placed, that it should be carried in a northward direction, thus compelling the plaintiff to hold on to one end of the rope with his hands, the other end of which was attached to one of the dogs, and whilst the plaintiff had hold of the rope, with the view of keeping it tight and moving the stone to the place desired, the stone fell and suddenly released the dogs, which flew up in consequence and dragged the plaintiff under the stone before he could let go the rope, and the stone fell on him causing the injury. The plaintiff further alleged that the system of lifting the stone by the dogs, instead of using chains and iron ropes was a dangerous and negligent system of raising stones established by the defendants, or which the defendants negligently permitted to be established and used in connection with the work of erecting the buildings.

The defendants alleged in their statement of defence, that the plaintiff had supervision of the work of raising the stone in question, and that he was not bound to conform and did not conform to the orders and directions of Amory.

The action was tried at Toronto before MEREDITH, J., and a jury, on October 16th, 1895.

The plaintiff's evidence so far as material, is stated in the judgment of BOYD, C.

At the conclusion of the plaintiff's evidence, the learned Judge dismissed the action, and in the course of his observations to the jury, before doing so, said, referring to the provision of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. ch. 30 (O.), sec. 3, sub-sec. 3: "I do not think there is any evidence to go to you that the man Amory was in any sense a superintendent of that character. As he tells us, as the whole of the facts shew, he was a common workman there, engaged with this plaintiff, he doing

one part of the work, the plaintiff doing another part of the work, a boy at the engine doing a third part of the work, Marshall being the foreman of them all, and having the superintendence in connection with this provision of the Act. Now, if negligence on the part of Marshall had been proved, I think there would have been a case to submit to you, but where is there a tittle of evidence that Marshall did anything that was negligent? Here were these men carrying on this work from day to day, knowing as well as Marshall how it ought to be done, having the chain there, and according to the plaintiff's statement always using that chain except upon the occasion, and Marshall says 'move that stone.' That does not mean to go and move it negligently. That is, to move that stone in a proper manner. If these persons had been in the habit, to Marshall's knowledge and with his consent, and still more strongly, if by his direction, of so lifting the stones, and he had then told them to move that stone, I should have left it to you to say whether or not he had given an order to move that stone in the way in which the plaintiff did move it. But there is no evidence of that character, nothing to shew that Marshall knew of the position of the stone; nothing whatever to shew that he knew the quarrymen had made these holes in the stone; nothing but the simple order to go and move that stone. It seems to me quite impossible to say that there was any negligence on his part in doing that, and quite idle, I think, to contend that Amory had any such superintendence as the Act provides for. For the Act says that "superintendent" shall be construed as meaning "such general superintendence over workmen as is exercised by a foreman, or person in like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour." Then the third provision is for recovery in a case of this kind where the injury is caused "by reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury, was bound to conform and did conform, where

Statement.

Statement. such injury results from his having so conformed." I fail to see any order to raise this stone in the manner in which these two men improperly attempted to raise it. It was, so far as the evidence goes, their own doing, and most unfortunately the plaintiff's own undoing. However, much as we sympathize with him, we have no right to give him damages unless the defendants are legally answerable for them. There does not seem to me to be anything like the giving of an order by Amory even. Amory did that which is of common occurrence, being the oldest man in that branch of the work, he carried the orders to the others, saying, "that is what we are to do." They do it of their own will. It seems to me there is no ground whatever for claiming upon the evidence adduced here, that this plaintiff was ordered to do that work in the way in which he did do it; nor that there was any such order given to him that he was bound to conform and did conform to."

The plaintiff on December 16th, 1895, moved before the Chancery Divisional Court by way of appeal, upon the ground, amongst others, that it should have been left to the jury to find as a matter of fact whether or not Amory who had charge of the derrick in question, had superintendence of the derrick so as to render the defendants liable for the directions given by him to the plaintiff, who conformed and was bound to conform to them, which caused the accident in question; whether or not Marshall or some other employee of the defendants, had not such superintendence of the derrick as to render the defendants liable for the directions given by Marshall, or some other of the defendants' employees which caused the accident in question, and to whose directions the plaintiff conformed and was bound to conform.

The motion was argued on December 16th, 1895, before BOYD, C., and ROBERTSON, J.

Clark, for the motion. "Bound to conform" in 55 Vict. ch. 30, sec. 3, sub-sec. 3, covers what we have here, viz.,

the custom in the yards: *Milward v. The Midland R. W. Co.*, 16 Q. B. D. 68; *Dolan v. Anderson and Lyall*, 22 Sc. L. R. 529; *Wright v. Walls*, 3 Times L. R. 779; *Wild v. Waygood*, [1892] 1 Q. B. 783; *Mullin v. Northern Mill Co.*, 53 Minn. 29; *Osborne v. Jackson*, 11 Q. B. D. 619.

Fullerton, Q. C., for the defendants. This is a case where two workmen being in equal position, one assumes to give an order, and the other chooses to obey. Amory was not in position of foreman. The plaintiff conformed to an order which he knew was wrong. If the work had been done in the usual way, the accident would never have happened. Can a workman by assuming to give orders without any authority, and the other assuming to obey, place the master in a position of liability? And the reason for the plaintiff's obedience comes simply to this, that Amory had been working previously to the plaintiff: *Howard v. Bennett & Son*, 60 L. T. 152; *S. C.*, 58 L. J. (Q. B.) 129.

December 17th, 1895. BOYD, C.:—

After a careful perusal of the evidence, I have been led to think that this case should have been submitted to the jury.

The accident occurred in the handling of a derrick, which according to the evidence was in the charge of a man called Amory; the evidence which goes to shew this is somewhat of an inferential character, yet still such as was proper for the jury to pronounce upon. We may gather from the manner in which the business was conducted, in how far Amory was in charge of the derrick. He says that the manner or custom of the work was that the oldest man working upon the derrick, was understood to be in charge of it.

The work done by the derrick was subsidiary to the work of the stone masons, and the foreman of the stone work was in the habit of giving instructions to Amory as to what was to be done, and these Amory was in the habit

Judgment.
Boyd, C.

of directing his assistants to carry out. Generally the evidence shews that Amory directed the work on this derrick, "the yard derrick," and gave the signals for its operation by machinery.

Now Marshall was the head stone cutter, and he was foreman over the whole work of the stone branch. He gave instructions for the lifting of the particular stone which did the injury. The way was for him to mark the stone to be lifted. On this occasion at the very time Marshall was telling Amory to go and lift "that stone" for the quarrymen, one of the men was putting holes in the sides of the stone for the purpose of lifting it by means of dogs. The evidence as given leads to the manifest conclusion that this was being done under the eyes of Marshall, as he marked the stone and directed its being lifted. This is the meaning, I think, of a rather confused part of the evidence, where Amory says that he lifted this stone with the dogs by Marshall's orders, because of the holes being put in by the quarrymen.

But apart from this, it is proved that this particular stone was prepared with holes to be lifted by the dogs by a quarryman under Marshall's orders; and that Amory who had charge of the derrick, overruled the plaintiff's objections to lifting this stone with dogs by relying upon the fact that the quarrymen had put these holes in the stone and thus indicated that it was one to be handled by dogs instead of being wrapped in chains. So to handle this stone was an improper direction, though the plaintiff did not know it was dangerous as it proved to be.

The manner in which the business was conducted, would seem to indicate that Amory was understood all round and by everybody to be in charge; that the foreman was cognizant of and sanctioned that way of doing the work; and that it may be fairly said that orders given by Amory in handling stones, which the foreman directed him to move, were such as his assistant was obliged to conform to within the meaning of the statute. There is evidence that the foreman told the plaintiff to help Amory on this

derrick work. Amory says he had charge of the derrick, and that the plaintiff assisted him. And the plaintiff says that Amory told him or ordered him to fasten the dogs on the stone—though this appears to be at variance to statements of his on an earlier examination. Still the matter of credibility is for the jury; and there would be an implied direction to fasten the dogs, as part of the usual course of business.

Judgment.
Boyd, C.

There is no clear case made out of contributory negligence on the part of the plaintiff as far as the evidence has gone; and altogether my conclusion is, that the case should go down to be fully tried out.

I would cite as authorities for the above conclusion, the cases of *Milward v. The Midland R. W. Co.*, 14 Q. B. D. 68; and *Dolan v. Anderson and Lyell*, 12 Rettie 804; S. C., 22 Sc. L. R. 529, which is much in point on the original of our section 3, sub-section 3 of the Act.

An order may be implied from the ordinary course of business, and so may the fact that a fellow-workman is in charge of a particular branch of work in such wise that his assistants are required to conform to his way of doing things, and ordering things to be done: *Wild v. Waygood*, [1892] 1 Q. B., at pp. 788, 791.

The plaintiff should get the costs of the last abortive trial and of this motion, as he has been twice nonsuited, and has still to get to the jury after great expense has been incurred.

ROBERTSON, J.—I fully concur in the foregoing.

A. H. F. L.

This case has been argued before the Court of Appeal and stands for judgment.—REP.

[COMMON PLEAS DIVISION.]

QUEBEC BANK V. TAGGART ET AL.

Chose in Action—Absolute Assignment—Secret Defeasance—Subsequent Assignment for Value without Notice—Equities.

Where a non-negotiable chose in action is absolutely transferred by writing for value, and the transferee again absolutely assigns it for valuable consideration to another person, who takes without notice, he obtains a valid title to it, free from any latent equity between the original assignor and assignee.

In re Agra and Masterman's Bank, L. R. 2 Ch. at p. 397, specially referred to.

Statement.

THIS was an interpleader issue directed to be tried between the Quebec Bank, as plaintiffs, and Jane Ann Taggart, the widow, and the children, of the late James Leslie Taggart, deceased, as defendants, the question to be tried being whether the plaintiffs were entitled to the sum of \$1,000 secured by a certain policy of life insurance, number 2598, in the Federal Life Assurance Company of Ontario, on the life of James Leslie Taggart, deceased, paid into Court by the company, less the costs of the company in connection with their application to pay the same into Court, taxed at the sum of \$48.09 (including the sum of \$49.50 and interest from the 13th December, 1891, at six per cent. per annum, and such sums as had been since paid by the plaintiffs or one John Cloy for premiums on such policy, with interest, to which the defendants admitted the plaintiffs were entitled), under and by virtue of an alleged assignment of said policy from James Leslie Taggart to John Cloy, dated the 13th October, 1891, and another alleged assignment thereof from John Cloy to the plaintiffs, dated the 4th January, 1892.

The issue was tried before FERGUSON, J., and a jury at Welland on the 30th October, 1895, when the jury returned a verdict for the defendants.

The policy in question was issued to James L. Taggart on the 1st September, 1886, and he on the 13th October,

1891, assigned it to John Cloy by the following indorsement thereon: "For valuable consideration, I hereby transfer, set over, and assign unto John Cloy all my right, title, and interest in the within policy, and in all benefits or bonuses to be derived therefrom, and I appoint the said John Cloy my attorney for the collection of the same, and when the said policy becomes a claim, the said claim shall be paid to him." Statement.

The assignment was notified to the Federal Life Assurance Company and assented to by them on the 14th October, 1891.

On the 14th January, 1892, John Cloy, by an indorsement on the policy, in the same terms as the assignment from Taggart to him, assigned his right and title in the policy to the plaintiffs, which assignment was notified and assented to by the insurance company on the 4th September, 1892.

Taggart died in May, 1895, and five or six weeks after his death one of his sons found in a desk belonging to his father, an envelope containing a document written and signed in pencil (bearing date the same day as the assignment to Cloy), as follows:

"Thorold, Oct. 13/91.

"I, John Cloy, this 13 Day of October Do except and take a Life Policy of 1000 dollars on the life of James L. Taggart of the Town of Thorold to Hold as security for a certin amount now due me of \$49.50 cts to be Paid from said policy 2598 from the Federal Life Association of Ontario Head Office Hamilton, and further do agree to keep said Policy 2598 in good standing by paying all regular quarter yearly payments notices sent from said Office at Hamilton for renewalls of said Policy 2598 and to receive at the end of James Taggart life to resive all such money paid with 6 per cent from the time of payment to the end of the said J. L. Taggart Life and all above my Clame to be paid to his wife if alive or to his children Lilly, Jiney, James A. and Wesley Ross Taggart and further does he agree to pay the sum of \$900 to the within

Statement. named in case I do let said policy 2598 elaps on account of not keeping said Policy 2598 regerually renewed primions paid up or caused to be paid. All this i fully agree to Do.
JOHN CLOY."

The evidence as to who wrote the body of the agreement was all given on behalf of the defendants, shewing that it was in the handwriting of the late James L. Taggart; and also that the following indorsement on the envelope which contained the agreement when found, viz., "James L. Taggart or Cloy's agreement to the end yours respectively," was likewise in the handwriting of Taggart.

The question submitted to the jury was whether the signature to this agreement was that of John Cloy or not. Much evidence, both of an expert character and otherwise, and including a comparison of the signatures of Cloy admitted to be genuine—some of them in pencil—with the signature in question, was submitted to the jury, who by their verdict found that the signature was Cloy's.

The plaintiffs moved to set aside the verdict and the judgment directed to be entered thereon for the defendants, "on the ground that the defendants are estopped from shewing that there was another contract or agreement setting out the terms upon which the policy upon the life of James L. Taggart, deceased, was assigned or transferred by him to John Cloy, as against the plaintiffs, who are holders thereof for value without notice of such other contract, under an assignment, absolute in form, from said James L. Taggart to said Cloy, who was allowed by said Taggart to receive and hold such assignment, absolute in form, which might come into the hands of parties having no notice of the trust upon which the jury found he held the same, and the plaintiffs having actually acquired the same and advanced moneys to the said Cloy thereupon, relying upon the fact that he was the absolute owner thereof; or for a new trial on the ground of misdirection on the part of the learned trial Judge in charging the jury that the only alternatives for them to find were: 'Did Cloy sign the agreement in dispute, or did James L. Tag-

gart forge his name thereto ?' And on the further ground Statement.
that the verdict is against evidence and the weight of
evidence."

The motion was argued before a Divisional Court composed of ROSE and MACMAHON, JJ., on the 5th December, 1895.

H. H. Collier, for the plaintiffs, referred to *Combes v. Chandler*, 33 Ohio St. 178; *Moore v. Metropolitan National Bank*, 55 N. Y. 41, 46, 47; Bigelow on Estoppel, 5th ed., p. 562.

Aylesworth, Q.C., for the defendants, cited *Cundy v. Lindsay*, 3 App. Cas. 459.

January 11, 1896. MACMAHON, J. (after setting out the facts as above):—

Although the assignment executed by Taggart on the back of the policy is absolute as to all the insured's interest therein, yet, the jury having found that Cloy executed the agreement of defeasance, it was urged that that created an equity between Cloy and Taggart, and that Cloy could only assign to the bank subject to such equity; that is, that Cloy could not assign any greater interest than the agreement between himself and Taggart gave him.

Assent cannot be given to the argument thus advanced. Lord Cairns in *Re Agra and Masterman's Bank*, L. R. 2 Ch. at p. 397, thus states the law: "Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities." And in Pollock on Contracts, 5th ed., p. 214, the author, after quoting the above statement of Lord Cairns, says: "Where assignees of a chose in action are enabled by statute to sue

Judgment. at law, similar consequences may be produced by way of
MacMahon, J. estoppel: *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642: which really comes to the same thing, the doctrine of estoppel being a more technical and definite expression of the same principle." And the rule of law is thus stated in *Bigelow on Estoppel*, 5th ed., p. 562: "If a man purchase *bond fide* and for value an unnegotiable chose in action from one upon whom the owner has by assignment or otherwise conferred the apparently absolute ownership, he obtains a valid title against the real owner, supposing the act of purchase to have been induced by such act of the owner."

In *Redfearn v. Ferrier*, 1 Dow H. L. 50, Lord Chancellor Eldon, at pp. 72-3, said that if latent equities were allowed to prevail against assignments, the effect would be that nothing could ever be assigned, and he had found no case or authority of any kind to support this position—that an intimated assignment might be defeated by a latent equity, which as being latent *ex necessitate* could not be intimated. And in *Moore v. Metropolitan National Bank*, 55 N. Y. at p. 47, the point under discussion is thus clearly and concisely dealt with: "Where one, known to be the owner of shares or chattels, delivers to another the scrip or possession of the chattels, together with an absolute written transfer of all his title thereto, he thereby enables him to hold himself out as owner, and, as such, obtain credit upon and make sales of the property; and if, after he had so done, the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practise the grossest frauds." And *Mott v. Clark*, 9 Penn. St. 399, is also a very instructive case.

The terms of the assignment indorsed on the policy and executed by Taggart are such as clearly indicate that the assignment was intended to be unaffected by any equities which may have existed between the parties to it. And the assignment clothed Cloy with authority to deal with the policy and dispose of it absolutely to any one

taking it for value without notice of the agreement. And, as it was not pretended that the bank had any notice of the agreement, it has to be seen whether the bank stood in the position of one giving value to Cloy for the assignment to it of the policy.

Judgment.
MacMahon,
J.

Cloy had been keeping his account with the Quebec Bank for many years prior to his assigning the policy to it, and he was at that time largely indebted to the bank for which it held customers' paper of Cloy indorsed by him for part of the indebtedness, and also held as security an assignment of a policy on Cloy's life for \$15,000 or \$16,000—on which the insurance company had lent Cloy \$2,000 or \$3,000.

The assignment from Cloy of the Taggart policy was brought to the bank on or about the day it bears date—the 4th January, 1892—by Mr. Shaw, one of the bank's solicitors, the assignment being the voluntary act of Cloy, as the bank was not at that time pressing him or demanding further security—at least for his past indebtedness.

Mr. Crombie, the manager of the bank, said that the Taggart policy was assigned to the bank as collateral security for advances. And at the conclusion of his evidence, in reply to questions, Mr. Crombie said:—

“Mr. Collier—Do you say that you made any further advance on the strength of getting this policy?”

Mr. Aylesworth objects.

His Lordship—If that is on the question of consideration to the bank for the assignment of the policy, that is unnecessary.

Mr. Collier—These notes Mr. Aylesworth refers to, on the 6th, what would you say as to whether or not the advances made on these dates were prompted by you having got this policy?

Mr. Aylesworth—I do not think that is a proper question.

His Lordship—Had you any special reason for making the advances on the 6th January? A.—Well, I can say

Judgment. that the advances at that time and at all future times—**Mr.**
MacMahon, Cloy was getting advances frequently, from time to time,
J. and they were always based upon us having more security
from time to time. He knew that these advances would be
more easy for him to put through if he had more security.

Mr. Aylesworth—You made all your advances on the
faith of your security? **A.**—More or less.

Q—According to the faith you had in your securities?
A.—Yes."

The advances spoken of as being made by the bank to
Cloy of the 6th January, 1892, were the discounting by
the bank of Cloy's own note, to which was attached two
notes of Cloy's customers, for \$162.06 and \$186.31, as col-
lateral security. And it appears that after the assignment
of the Taggart policy the bank made advances from time
to time to Cloy—sometimes for small amounts on his own
note—the advances being made more or less readily
according to the extent of the security furnished by Cloy
to the bank. And Cloy says he offered the assignment to
the bank in order that he might get further advances.
According to **Mr. Crombie's** evidence, the bank has col-
lected all the customers' paper belonging to Cloy that was
any good, and the only security for the payment of Cloy's
indebtedness is the policy on his (Cloy's) life and the
money arising out of the Taggart policy.

The only evidence before us is that the policy was
assigned by Cloy that he might the more readily obtain
further advances, and that further advances were made on
the strength of its being a security to which the bank
could look.

The assignment was, therefore, for valuable consider-
ation, and, as it was without notice of the agreement of de-
feasance given by Cloy to Taggart, the judgment directed
to be entered for the defendants must be set aside and
judgment directed to be entered for the plaintiffs with
costs.

ROSE, J. :—

Judgment.

Rose, J.

I agree that the plaintiff must succeed.

I am quite unable to distinguish this case from that of *Martindale v. Taylor* (unreported). The appeal was from the County Court of the county of York to the Court of Appeal, and the appeal book may be found in the bound appeal cases, vol. 11, November, 1878. There the Court held that the vendor of show cases was estopped as against a sub-vendee from claiming the cases under a rent or lien contract, which provided that the property should not pass until payment of the purchase money, because that the vendor gave the vendee an invoice receipted as follows: "Settled by note at six months;" the sub-vendee swearing that he purchased the cases on the vendee's representation that they were free from any lien, and the production of the receipted invoice as evidence of the fact. There the legal title to the property as between the parties was in the vendor; yet the Court held that he was by such receipt estopped from setting up the fact. Any difference between the cases makes in the plaintiff's favour in that case.

The learned Judge of the County Court in his judgment in that case said:—"If the plaintiff had not furnished Glensor with the receipted invoice, and kept the order and agreement in his own possession, *Walker v. Hyman*, 1 A. R. 345, and the other cases would cover the present case." *Dyer v. Pearson*, 3 B. & C. 38, is there referred to.

I agree that there must be judgment for the plaintiff with costs.

E. B. B.

[COMMON PLEAS DIVISION.]

RE McCABE V. MIDDLETON.

THE ANCIENT ORDER OF UNITED WORKMEN,
GARNISHEES.

Division Courts—Garnishee Proceedings—"Cause"—"Action"—Jurisdiction.

A garnishee summons before judgment in a Division Court may be issued out of the Division in which the garnishee lives or carries on business, notwithstanding that the cause of action does not arise and the primary debtor does not reside or carry on business therein.

A garnishee proceeding under section 185 of the Division Courts Act is an "action" or a "cause" within the meaning of section 87, and may be transferred from a wrong to the proper forum, under the last mentioned section.

Hobson v. Shannon, 26 O. R. 554; *Re McLean v. McLeod*, 5 P. R. 467, and *Re Tipling v. Cole*, 21 O. R. 276, specially referred to.

Statement.

THIS was a motion for an order for a mandamus to the Judge of the Third Division Court of the county of Elgin, to proceed with the trial of a cause in which P. McCabe was primary creditor—Elizabeth Middleton was primary debtor and the Ancient Order of United Workmen, Lodge 302, Toronto, of said Order, and A. E. Porch, Recorder of said Lodge, were garnishees.

The action was originally brought in the Tenth Division Court of the county of York, to recover the amount of a promissory note made in the town of Orangeville, and payable at a bank there by the primary debtor, who, it was admitted, did not reside in the county of Elgin.

The head office of the Ancient Order of United Workmen was in the city of St. Thomas, within the Third Division Court of the county of Elgin.

Objection was taken both by the primary debtor and the garnishees to the jurisdiction of the Judge of the Tenth Division Court of the county of York, and an order was made by him transferring the cause to the Third Division Court of the county of Elgin.

On the matter coming up before the Judge of the latter

Court, the same parties objected to the jurisdiction of that Court upon the grounds: Statement.

(1) That the Judge of the Tenth Division Court of the county of York had no jurisdiction to make the order transferring the case to the Third Division Court of the county of Elgin, because this was not an "action" or a "cause" within the meaning of section 87 of the Division Courts Act.

(2) That the cause of action did not arise nor the primary debtor reside or carry on business within the jurisdiction of the Third Division Court of the county of Elgin.

(3) That both the primary debtor and garnishees must be within the jurisdiction of the Third Division Court of the county of Elgin, to give that Court power to try the case.

(4) That as the two last mentioned garnishees did not reside or carry on business within the jurisdiction of the Third Division Court of the county of Elgin, that Court had no power to try the said case.

(5) That a judgment to be valid against the garnishees, must be valid against the primary debtor.

(6) That the case did not come within sections 81, 82, 83, 84, or 86 of the Division Courts Act.

On these objections being made the learned Judge refused to try the case, holding that the primary debtor was a "defendant" within the meaning of section 81 of the Act, and should not be summoned under the garnishee clauses of the Act, except in the division where he resided or carried on his business, or where the cause of action arose, and that he had no jurisdiction.

The motion was argued in Chambers on November 29th, 1895, before ROSE, J.

Tytler, for the motion, relied upon section 185 of the Division Courts Act.

Armour, Q. C., for the primary debtor.

Totten, Q. C., for the garnishees.

Judgment. December 4, 1895. ROSE, J. :—

Rose, J.

The primary debtor resided at Orangeville, I think it was said—at all events not in the county of Elgin. The garnishee, the Ancient Order of United Workmen, had its head office in St. Thomas. Two others were named as garnishees, but were not served.

Section 185 of "The Division Courts Act," expressly enacts that in such a case the summons may issue out of the Division Court of the Division in which the garnishee carries on business, such Court, in this case, being in St. Thomas; unless, indeed, the adding as garnishees two parties not served, and against whom it was not intended to proceed, would make a difference, and it was not contended before me that it would, and I do not think it would. This fact was apparently not brought before His Honour Judge Hughes, *i.e.*, that only one of the garnishees had been served.

Had the summons been issued out of the Third Division Court of the county of Elgin, I am of opinion that Court would, under section 185, have had jurisdiction.

The summons was erroneously issued out of the Tenth Division Court of the county of York, and the cause was by order of His Honour Judge Morson transferred to the Third Division Court of the county of Elgin.

If he had jurisdiction to make such an order under section 87 of "The Division Courts Act," then the cause was properly in the Court to which it was transferred for trial.

It was argued that the proceeding was not an "action" or a "cause" within the meaning of such section; but I think it must be held that it was. Clearly as against the debtor it was an action in which the primary creditor must prove his claim and proceed therein to judgment and execution, as provided by the practice; and I do not know how else it could be styled if it is not an action.

That in such action, or added to it, or along with it, proceedings are permitted to be taken against the garnishee, does not, as far as I can see, make it less an action.

Chapter 10 of 51 Vict., sec. 2 (O.), seems to me to indicate the policy of the Legislature to be to extend to garnishee proceedings all the beneficial or remedial clauses of the Act.

Judgment.

Rose, J.

The cases of *Hobson v. Shannon*, 26 O. R. 554, and *Re McLeun v. McLeod*, 5 P. R. 467, do not conflict with this view. The former was a proceeding where the creditor's claim was a judgment. The latter depends on the provisions of the statute respecting garnishee proceedings, and nothing in the reasoning appears to lead to the conclusion that any beneficial clauses of the Act are not applicable to such proceedings, but the contrary would appear to have been the view.

The *ratio decidendi* in *Re Tipling v. Cole*, 21 O. R. 276, seems to be in favour of the view I have taken.

The order must be granted with costs, to be paid by the garnishees and the primary debtor.

From this judgment the defendant appealed to a Divisional Court, and the appeal was argued on January 10th, 1896, before BOYD, C., and STREET and MEREDITH, JJ.

E. D. Armour, Q.C., for the appeal. A garnishee proceeding is not a "cause" or "action" within the meaning of section 87 of the Division Courts Act. It is a species of execution and could not be transferred. Section 80 shews what an action or a claim is, and it must be tried where the cause of action arose or defendant resides. A garnishee is not a defendant: *Re Holland and Wallace*, 8 P. R. 186, and could not be added as a party under section 108. Garnishees had no right of appeal under the Revised Statutes, ch. 51, sec. 148 (O.), ch. 47, sec. 40 (O.), and so special legislation gave it to them: 51 Vict. ch. 10, sec. 2. Garnishees could not be examined as judgment debtors, even when judgments were recovered against them, so special legislation had to give them that too: 57 Vict. ch. 23, sec. 18 (O.). Garnishee proceedings are distinct from other proceedings and stand by themselves:

Argument. *Per* BOYD, C., in *Hobson v. Shannon*, 26 O. R., at p. 556. The parties are not even called plaintiff and defendant, but primary creditor, primary debtor and garnishee.

Totten, Q.C., for the garnishees. The plaintiff should have proceeded in the Court at Orangeville, where the cause of action arose, or at Orillia, where the defendant resides, under section 81. That section is not repealed by section 185.

Tytler, for the plaintiff. Garnishee proceedings are mentioned as a cause of action in section 185. A garnishee is a defendant within section 81, and the plaintiff was rightly in the St. Thomas Court, and the action was rightly transferred from Toronto. The statute gives power to make rules: Section 298. "Party" includes every person served with notice: Rule 2. No proceeding shall be defeated by any formal objection: Rule 236. The whole tenor of Rules 212, 213, 214, 215 and 216, shews the plaintiff is entitled to succeed. *Re Holland and Wallace*, 8 P. R. 186, only applies where there is no garnishable debt.

Armour, Q.C., in reply.

January 16th, 1896. BOYD, C.:—

In Division Court litigation when it is sought to combine garnishee proceedings with the ordinary claim for a debt or money demand against a party defendant, the Statute R. S. O. ch. 51, secs. 173 and 185, provides for the plaintiff proceeding against both the debtor and the garnishee as parties defendant by means of one summons which combines both objects.

This compound proceeding is spoken of in the Act both as an *action* and a *claim*. It is commenced by summons under the seal of the Court, which is the usual process, and this is to be issued in that division where the garnishee is resident; but if the garnishee is non-resident, then it shall be issued in that division where the cause of action arose: Section 185 (2). The ordinary defendant is now to be

styled primary debtor, and the special defendant is to be styled garnishee, and the plaintiff is called primary creditor. The particulars of the claim of the primary creditor against his debtor are to be given with reasonable certainty and detail. It is by the rules declared that the meaning of the words "the claim" is the demand or the subject-matter for which any suit or proceeding is brought or instituted in a Division Court: Rule 2 (14).

Judgment.

Boyd, C.

The statute gives the garnishee the right to contest the claim of the primary creditor as well as the debtor: Section 188 (1). So that it appears that the matters under adjudication are not only the same as but larger than those arising between ordinary debtor and creditor. This is probably the reason why the locality of this special litigation is fixed with reference to the garnishee's residence when within the jurisdiction in preference to that of the cause of action.

Now, if a proceeding under section 185 is begun in the wrong Court, I consider there is very plain authority given by section 87 of the Division Courts Act to transfer it to the proper forum, *i.e.*, to the place of residence of the garnishee, if within Ontario. This section is classed under the general heading of "Process and Procedure," and applies to all process issued in the Division Court—"process" being defined as "any summons * * issued under the seal of the Court": Rule 2 (15). By section 86 the claim or action or proceeding in this case being transferred from the county of York to the county of Elgin, the residence of the garnishee, that local Court became seized of the whole with ample jurisdiction to deal with all matters in controversy on the merits.

Section 81, relied on by Mr. Totten, gives the alternative proceeding in choice of Courts, as between the cause of action and defendant's residence, in ordinary litigation; but that is displaced if the garnishee element is introduced contemporaneously with the ordinary claim between debtor and creditor by the explicit language of section 185.

The order of Rose, J., is affirmed, with costs to be paid by both parties supporting the appeal.

Judgment. STREET, J. :—

Street, J.

These are proceedings taken under the garnishee clauses of the Division Courts Act before judgment. The plaintiff's claim is on certain notes which were made at Orangeville, and were payable there. The primary debtor lives at Orillia and the garnishees have their head office at St. Thomas, all being in different counties.

The primary creditor began his proceedings at Toronto. The primary debtor and the garnishees filed and served notices disputing the jurisdiction, and upon the matter coming before the Judge in Toronto he made an order, assuming to act under section 87 of the Division Courts Act, transferring the proceedings to the Division Court at St. Thomas, where the garnishees reside. These proceedings, begun in Toronto and transferred by this order to St. Thomas, are the only foundation for the pending proceedings which it is sought to compel the Judge presiding over the Division Court at St. Thomas to act upon. Their validity is questioned by the primary debtor and garnishee, who contend that the 87th section only applies to "an action" and that those words do not include proceedings taken under section 185, where a garnishee is one of the original parties to the proceedings. I agree that for some purposes of the Act a distinction is to be made between an action and garnishee proceedings, but it is equally plain that for other purposes "an action" is intended to include garnishee proceedings. For example, if we look at section 108 of the Act as amended by 52 Vict. ch. 12, sec. 12 (O.), we find that in any "action" brought in a Division Court the Judge may at any time "after action commenced" order that the name of any person who ought to have been joined as "defendant, primary debtor, or garnishee, shall be added as a party, defendant, primary debtor, or garnishee."

If, then, "an action" for some purposes includes garnishee proceedings, what reason is there for holding that section 87, which enables the Judge to transfer to the

proper Division Court proceedings in an action wrongly entered in one of his own Division Courts, is to be confined to those actions in which the parties are styled plaintiff and defendant and not to be extended to those in which they are styled primary creditor, primary debtor and garnishee? I can find none either within or without the Act when once I have ascertained that "an action" may include garnishee proceedings.

Judgment.

Street, J.

I think, therefore, that the Judge of the Division Court at Toronto had power to transfer the proceedings before him to the proper Division Court. Then, it is contended that if the proceedings are proceedings in an action they should have been transferred to Orillia, where the primary debtor lives, or to Orangeville, where the cause of action is said to have arisen, and not to St. Thomas, where the garnishees have their head office.

As I read the Act, however, for the purposes of ascertaining the local jurisdiction, an action and garnishee proceedings are to be distinguished. The Act is to be read as a whole, and it contains distinct provisions applicable to the two classes of action, which it is not difficult to harmonize and which we must assume were intended to be read so as not to neutralize one another in any case. This is, I think, readily done by confining the operation of sections, 81 and 82, which require that a defendant shall be sued where the cause of action arose or where the defendant resides, to cases in which there is no garnishee, and by allowing section 185 to operate and govern where a garnishee is a party to the action. It is suggested as a reason against such a construction that a creditor could, under it, make section 185 a means of dragging a distant debtor to any Court he wished by asserting the existence of a debt from a friend to the debtor and thus founding a local jurisdiction.

The jurisdiction in garnishee cases, however, where the primary debtor and the garnishee live in different divisions is founded upon the existence of a debt from the garnishee to the primary debtor, not upon the mere asser-

Judgment. tion of its existence, and when the jurisdiction is properly
Street, J. contested the fact upon which it rests must be duly proved.

Here the primary debtor and the garnishees have disputed the jurisdiction of the Division Court at St. Thomas, one of the grounds being that no debt is due from the garnishee to the primary debtor. The plaintiff must prove this in order to sustain the jurisdiction of the St. Thomas Court. If he succeed in doing it then the jurisdiction of that Court over all the parties is complete; if he fail in doing so the jurisdiction asserted by the plaintiff fails.

In my opinion for these reasons the judgment of my brother Rose was correct, and the appeal should be dismissed with costs payable by the primary debtor and the garnishees.

MEREDITH, J.:—

To give effect to the appellant's contention would be to cut down the right to attach debts before judgment to cases where, generally speaking, a garnishee happens, to reside or carry on business, and where the cause of action against the primary debtors arose or in which one of them, resided or carried on business at the time the action was brought, in effect repealing largely the 185th section of the Act and upsetting the practice under it ever since it was passed.

Remembering that the garnishee provisions of the Act were engrafted into the Act in comparatively recent years, and that section 81, in its present form, was part of the Act long before such provisions were so engrafted, one finds no difficulty in reconciling and giving full effect to both; that is to say, in ordinary suits the proceedings must, generally speaking, for there are special cases otherwise provided for, be taken where the cause of action arose or where a defendant resides or carries on business at the time the action is brought, but, under the new and extraordinary procedure under section 185, the suit must be brought where a garnishee lives or carries on business.

Introducing a new right of action, permitting a plaintiff ^{Judgment.} in one suit to proceed against both his debtor and his ^{Meredith, J.} debtor's debtor, it became necessary to provide for the place where such proceedings might be taken, and, between the conflicting rights and claims of creditor and debtor and garnishee, the Legislature, not departing from the policy of the Act, chose, again speaking generally, the place of residence or business of the garnishee.

At common law it is the duty of the debtor, when no place of payment is agreed upon, to seek the creditor and pay him wherever he may be. That right of the creditor was entrenched upon in the ordinary proceedings under the Act, by requiring him to seek the debtor to the extent of suing where the whole cause of action arose: *Noxon v. Holmes*, 24 C. P. 541; or where a defendant, resides or carries on business at the time the action is brought, and, following out that policy under the garnishee proceedings, the Act requires that proceedings shall be taken where a garnishee lives or carries on business, he being the debtor of the debtor, and by virtue and for the purposes of the Act, substantially made debtor to the creditor.

Giving this extraordinary remedy to creditors, they are required, if they choose to avail themselves of it, to go to the garnishee for it and are deprived of the right to sue where the cause of action arose: while the debtors are put in just the same position, treating it as their suit, the proceedings must be taken where a defendant lives or carries on business, and they are deprived of the right to sue where their cause of action arose. Where the parties' interests conflict the garnishees are, naturally enough, first considered, for, generally, they have no interest in the questions between debtor and creditor and are likely to be the parties least concerned in and most inconvenienced by the proceedings. And besides this, the debt of the garnishee, in no doubt a large proportion of cases, has been contracted and his creditor resides or carries on business at or near his place of residence or business.

It would be impossible to suit the convenience of all. A

Judgment. great deal was done in a defendant's favour in depriving a creditor of his right to sue where the debt was payable, and yet, as the Act originally was, a debtor was left in some cases to as great inconvenience as that which the debtor here complains of; for instance, though all the makers of a note resided in, say Cornwall, and though the note was made there and there endorsed over to the plaintiff, it might be sued at, say Rat Portage, if the endorser happened to reside or carry on business there at the time of the bringing of the action and was also sued.

Meredith, J.

The one cause of complaint against proceeding at St. Thomas is that the debtor resides in Orangeville or Orillia, but surely there would be a greater cause of complaint on the part of the garnishees, who reside at St. Thomas, if they were sued at Orangeville or Orillia. At common law the plaintiff might insist upon his debtor's paying him where he resided, there being no agreement to the contrary; but at common law he had no claim at all against the garnishees, so that the Legislature seems to have done the fairest thing in the conflicting rights of the three parties and where necessarily some one must be inconvenienced.

There is no great inconvenience likely to arise from the bringing of several garnishee suits against different garnishees in different places, as suggested by the learned County Court Judge in his judgment: the debt of the primary debtor would merge in the first judgment, and the creditors course then would be by way of garnishee proceedings after judgment. Besides, it is not to be assumed that a misuse of the practice of the Court will be indulged in. There is room in the practice of all Courts for just as great a misuse of it if litigants were disposed merely to harass an opponent. But that cannot be done without the like or greater cost and inconvenience to themselves and is not often indulged in, and there are many ways of preventing it.

There is no reason why the remedial provisions of section 87, as amended by sec. 5, ch. 12, 52 Vict. (O.), should not be applied to proceedings under section 185.

They were enacted after the garnishee proceedings were Judgment. engrafted into the Act, and I cannot imagine any reason Meredith, J. why they should not be held applicable to the whole Act as well as what was the Act before the extraordinary remedy was introduced.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. COURSEY.

Prohibition—Justice of the Peace—Issue of Distress Warrant.

Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a Justice of the Peace upon a conviction regular on its face, and which was within the jurisdiction of the Justice making it, such acts being ministerial, not judicial.
Judgment of ROSE J., 26 O. R. 685, reversed.

THIS was a motion by way of appeal from the judgment Statement. of ROSE, J., reported 26 O. R., at page 685, where the facts are set out. The following were the grounds of the motion: (1) That the learned Judge erred in holding that an appeal lay to the sessions from the convictions herein; (2) That he erred in holding that the giving of the notice of appeal and the taking of security to the sessions operated as a stay of proceedings on the said convictions; (3) Also in holding that prohibition was a proper remedy in this case; (4) and that the said order was contrary to the law and to the evidence.

In Michaelmas Sittings, November 22nd, 1895, before the Queen's Bench Division, ARMOUR, C. J., and FALCONBRIDGE, J., *Aylesworth*, Q. C., supported the motion. The first point is that there is no appeal. Section 112 of the Public Health Act, R. S. O. ch. 205, provides that upon a conviction under the Act neither a *certiorari* nor any appeal to the Sessions will lie. The learned Judge was of the opinion that as the conviction was under sec-

Argument. tion 4 of the schedule, and not under the Act itself, section 112 did not apply. The schedule, however, is part of the Act, and governed by its provisions. This has already been decided by the Judge of the County Court of the County of York, in the case of *Regina v. Redmond*, which subsequently came before the Common Pleas Division, and is reported in 24 O. R. 331. Section 879 of the Criminal Code only authorizes an appeal where there is no provision to the contrary in any special Act. Even if there is a right of appeal, it does not create a *respondeas*, and so prevent the magistrate doing what has been done here. The magistrate having had jurisdiction to act, the remedy, if any, must be by an action for malicious prosecution: *Kendall v. Wilkinson*, 4 E. & B. 680; *Regina v. Willmott*, 1 B. & S. 27; *Regina v. Wood*, 5 E. & B. 49. See also section 885 of the Criminal Code. Then prohibition does not lie, as this was not a judicial, but a ministerial act, and prohibition only lies when the act is done in a judicial capacity. The prohibition also must be to a Court and not to an individual. The moment the conviction was made and the warrant signed, the duty of the magistrate was at an end, and he was *functus officii*. The learned Judge referred to the issue of the writ of prohibition to the bailiff in a Division Court in proceedings in the Division Court, but that is a civil matter where a different principle exists. The proper remedy, if any, would be by injunction: *Hedley v. Bates*, 13 Ch. D. 498, 502-3.

Shepley, Q. C., contra. It is conceded that the conviction is under section 4 of the by-law—(*Aylesworth, Q. C.* : The conviction is not under the by-law, but under the schedule).—The term by-law and schedule are synonymous. The distinction which the applicant endeavours to make, is that the conviction was not under the Act itself. If the conviction had been under a by-law passed by the municipality under the powers conferred by the Act, there cannot be any question as to the right of appeal. The Legislature passed the by-law for the municipalities, and it

Argument.

is to be treated as a municipal by-law until the municipalities pass one for themselves. There is a clear distinction between the provisions of the Act, and the provisions of the schedule or by-law. The municipalities cannot interfere with the provisions of the Act, while they are given express power to pass by-laws in lieu of the provisions of the schedule. Section 112, therefore, does not affect the right to appeal. Then, if there is an appeal, it constitutes a *supersedes*. The statutes referred to in the English cases are quite different from the provisions in our statutes. The English statutes do not create a stay, while ours do: see Criminal Code, secs. 880-890. Under the provisions of the Act, as soon as an appeal is lodged, the justice's hands are stayed. Then as to the right to prohibition, the case of *Regina v. Herford*, 3 E. & E. 115, shews that prohibition lies as well to a court of criminal as to one of civil jurisdiction, and the act here was a judicial act. The magistrate could only issue a warrant by virtue of his office as magistrate. It, therefore, properly lies in a case of this kind: High on Prohibition, sec. 789.

December 14, 1895. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The initial question to be determined in this case is whether prohibition will lie, for if it will not, our decision of the other questions raised would be extra-judicial.

And the broad question to be determined is whether this Court will prohibit the issuing of a warrant of distress, or the enforcing of it when issued, by the justices upon a conviction regularly made by them in due form of law, in a matter over which they had jurisdiction, whereby they convicted the offender of the offence, charged and adjudged him to pay a fine and costs, and ordered that the same should be levied by distress and sale of the goods and chattels of the offender.

Prohibition will only lie to prohibit proceedings of a judicial character, and although, no doubt, the conviction,

Judgment. adjudication and order were judicial acts, were the issuing of the warrant thereon and the enforcing it judicial acts, the conviction still being in full force, or were they merely ministerial acts to prohibit which prohibition would not lie?

Armour, C.J.

I am of the opinion that they were not judicial acts but merely ministerial acts, and that the fact that an appeal was taken against the conviction did not alter the character of the acts although it might render them unlawful.

That they were merely ministerial acts is, I think, the conclusion to be drawn from all the authorities I have been able to find in our Courts and in the English Courts.

In New York, in *Ex parte Braudlucht*, 2 Hill N. Y. 367, it was held that prohibition will in no case lie to an inferior Court to restrain the issuing of an execution, for this is a ministerial not a judicial act, the Court saying "the office of a prohibition is to prevent Courts from going beyond their jurisdiction in the exercise of judicial, not ministerial powers. Otherwise we might be called on to send the writ whenever a justice of the peace was about to issue civil or even criminal process irregularly. * * There is no colour for saying that the act of issuing an execution is judicial."

It would be opening a wide door for prohibition were we to hold that the issuing of a distress warrant and the enforcing it in pursuance of the order contained in a conviction, which was within the jurisdiction of the justices who made it, were judicial acts.

If the issuing of the distress warrant and the enforcing it were, under the circumstances of this case, wrongful, the persons against whose goods and chattels they were issued and enforced have an ample remedy, but such remedy is, in our opinion, not by prohibition.

The order for prohibition will, therefore, be annulled and the motion for it dismissed, with costs here and below to be paid by the applicants.

G. F. H.

[QUEEN'S BENCH DIVISION.]

REGINA V. OSBORNE.

Gaming—Betting—Place Therefor—Telegraph Office—Conviction—55 & 56 Vict. ch. 29 (The Code), secs. 197 and 198.

A bank, a telegraph office, and another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the United States, which receipts were taken to the telegraph office, where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there, for whom the receipts were given to place and who placed bets equivalent to the amounts deposited, on horses running in the races, and on their winning the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the person making the bets in the United States:—

Held, on the evidence and admissions to the above effect, that the defendant, who kept the telegraph office, was properly convicted of keeping a common betting house under sections 197-198 of the Criminal Code.

THIS was a criminal case reserved by the police magistrate of the town of West Toronto Junction, and was argued in the Queen's Bench Division on November 1st, 1895, before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ. Statement.

The facts were set forth in the case reserved and the findings of the police magistrate, as follows:—

"The defendant in this case was tried before me, Peter Ellis, police magistrate in and for the town of Toronto Junction, at the police court in the said town, upon an action charging 'That William Osborne, on the 15th day of April, in the year of our Lord 1895, and on divers other dates and times between the 10th day of April in the year last aforesaid and the 18th day of the same said month unlawfully did keep a disorderly house, to wit, a common betting-house, at the house and premises known as No. 74 Dundas street, in the said town of Toronto Junction, contrary to the Criminal Code, sections 197 and 198.'

As the evidence is short, and the facts, except where as admitted, are in dispute, the evidence and proceedings are attached hereto and made part of this case.

My written judgment is also attached hereto and made part of this case.

Statement.

At the request of the counsel for the defendant I reserve for the consideration of the Court of Appeal, being the Queen's Bench Division of the High Court of Justice for Ontario the following questions :—

1. Is my finding that there is a connection between the offices of the defendant and the bank of Beatty & Co. justified and supported by the evidence ?

2. Is my finding that Bennett is a person using the offices of the said defendant justified and supported by the evidence ?

3. Is my finding that the bookmakers with whom the said Bennett made bets for the persons sending messages through the office of the defendant, were persons procured and employed by the said Bennett, justified and supported by the evidence ?

4. Was I, upon the facts established by the evidence, right in finding the defendant guilty ?

As this case differs in some respects from any other case which has been cited to me, I have thought it well to put my conclusions in writing.

The information is laid under section 197 and 198 of the Criminal Code, and is as follows : "That Wm. Osborne on the 15th day of April, in the year of our Lord 1895, and on divers other days and times between the 10th day of April in the year last aforesaid and the 18th day of the same said month unlawfully did keep a disorderly house, to wit, a common betting-house, at the house and premises situate and known as No. 74 Dundas street east, in the said town of Toronto Junction, contrary to the Criminal Code, sections 197 and 198."

The object of this statute is quite clear ; it is to prevent the keeping of houses or offices for the purpose of betting, and I think it is my duty to interpret the statute in as wide a sense as possible, so as to include any offence which may fairly be considered within the purposes of the statute, and, if I am in error, will leave it to a higher Court to correct me.

I find that the premises, 74 Dundas street, were opened

for business (thereafter carried on in them) on the 10th day of April, A.D. 1895, and that at or about the same time a private bank was opened at 112 Dundas street, and at or about the same time an office was opened at No. 64 Dundas street by one Brennan, an agent of one M. Bennett. Statement.

That the premises at No. 74 Dundas street were occupied during the period set out in the information by the defendant Wm. Osborne, who carried on business there, amongst other things sending telegraphic messages from different persons to incorporated race tracks in the State of Virginia, requesting the said Bennett to place, or bet, there, sums as set out in such telegrams upon races then in progress upon the said race tracks.

That information was furnished at the said premises, No. 74 Dundas street, with reference to the progress of the said races, and numbers of persons day by day during the time aforesaid resorted to the said premises for the purposes of betting upon the said races, and did bet in the manner set out, the moneys being placed with bookmakers at the race tracks by the said M. Bennett.

That there is evidence shewing a connection between the rooms at 112 Dundas street and 74 Dundas street, receipts issued at the former place being in a number of cases on different days during the time aforesaid received by the said Osborne at 74 Dundas street and stamped by him and returned to the party or parties sending messages, and no charge made for the transmission of messages to the said Bennett to the persons who produced such receipts.

That the said M. Bennett was, therefore, a person using the said premises, No. 74 Dundas street, and that the bookmakers at the said race tracks were persons procured and employed by the said Bennett, and that as the said Osborne permitted the premises in question to be used for the purposes of betting between persons resorting thereto and the said bookmakers at the race tracks, therefore the transaction comes within the meaning of the first part of the section of the Code under which the charge was laid.

Statement. I therefore find the defendant Wm. Osborne guilty of keeping a common betting-house, under section 198 of the Criminal Code, 1892, and sentence him to imprisonment in the common gaol of the county of York for a period of one month, and to payment of a fine of \$100 without costs."

On the argument before the Queen's Bench Division, questions 1, 2 and 3 (as to whether the magistrate's findings were justified and supported by the evidence) were, on the suggestion of the Court, abandoned by counsel, and the argument proceeded on question 4 alone; the facts being taken as set out in the magistrate's findings, and in the following admissions which were made and put in at the trial before him.

1. That, at the time mentioned in the information, that is, from the 10th to the 18th of April, 1895, inclusive, there were races going on at St. Asaphs and Alexander Island, respectively, in the State of Virginia, being the race-courses of an incorporated association, and, during the actual progress of race meetings, such racing not being illegal under the laws of the State of Virginia.

2. That upon each of the days in question messages were received by the defendant Osborne by telegraph from the racing department of the Western Union Telegraph Company (which company furnished similar information to other points), conveying information received from the respective race tracks, as to the races in progress on each day, the names of horses running, the jockeys, weights, and betting odds at the race tracks, on the respective horses in the respective races, which information was forthwith and from time to time posted on the blackboard at the premises No. 74 Dundas street, in the town of Toronto Junction, then occupied by the defendant Osborne, to furnish the necessary information to those who desired bets placed upon the said races at the said race tracks respectively, St. Asaphs and Alexander Island, and for that purpose had gone to the office of the defendant aforesaid.

3. That M. Bennett, to whom was sent at the said race-course, telegrams from G. C. Flintoff, J. R. Royce, Charles F. Wright and William Harris, received such telegrams at the said race courses, understood them to mean instructions for him to bet for these gentlemen upon the said race courses the sums mentioned in the said telegrams upon the horses mentioned in the said telegrams, and that he did make such bets for the said witnesses upon the said race courses with bookmakers. Statement.

4. That upon the horse Thurston winning at one of the said race tracks one of the races, the said Bennett telegraphed through the ordinary wires of the Great Northwestern Telegraph Company, and not through Osborne's wire or office, to John Brennan, at Toronto Junction, to pay to the said William Harris the sum of \$2, and that upon the horse Albert Sydney winning another of the said races, the said M. Bennett in like manner telegraphed to the said John Brennan to pay to the said J. R. Royce the sum of \$2; and that in each instance the sum of \$2 was the sum received by the said Bennett from the bookmakers with whom he had betted the sums mentioned in the telegrams from Harris and Royce respectively; and that the said Brennan paid the said moneys as instructed, and this method was adopted in all cases in which the money was won by those who had so telegraphed.

Riddell, for the defendant. The evidence did not justify the magistrate in finding the defendant guilty. Section 197 of the Code 55 & 56 Vict. ch. 29 (D.), defines a common betting house, and section 198 who is the keeper. The finding was that the bets, if any, were made, not in Canada but in the United States: that is admitted by the Crown, and under *Regina v. Smiley*, 22 O. R. 686, the conviction cannot be upheld. It is also admitted that racing during actual race meetings was legal in the United States; and that is so in this country under sub-section 2 of section 204 of the Code. The evidence only shews a telegraph office was kept open in the usual way and that

Argument. is not betting. The magistrate was wrong in holding that the bank where the money was deposited and the telegraph office where the messages were dispatched were so connected as to bring the defendant within sub-section a (ii) of section 197. I refer to *Davis v. Stephenson*, 24 Q. B. D. 529, Taschereau's Criminal Code, p. 135, and Stuffleld on Betting, pp. 179, 184 *et seq.*, and cases cited.

John R. Cartwright, Q. C., for the Attorney-General. *Regina v. Smiley*, does not apply, as that case was in respect to *lawful* races. The object of the statute was to prevent places being kept to facilitate betting and especially ready money betting. The facts are these places were opened simultaneously, a bank, a telegraph office, and a place where bets were paid. The evidence shews it was one complete scheme. The person betting deposited his money in the bank and got a receipt; he then took the receipt to the telegraph office, and a message placing his money on a certain horse was sent without charge, and if that horse won he was paid at the third place. The conviction was justified by the evidence, and was proper under sections 197 and 198 of the Code. I refer to *Regina v. Giles*, 26 O. R. 586, and *Regina v. Howard*.*

Riddell in reply.

* REGINA V. HOWARD.

The judgment of the Court (Common Pleas Division) was delivered by
MEREDITH, C. J.:—

Case reserved by Mr. Justice Street at the Welland Assizes.

The defendant was charged under section 198 of the Criminal Code, 1892, with keeping a disorderly house, that is to say a common betting house, and the question raised is as to whether on the facts appearing in evidence an offence under that section was made out.

The facts were substantially the same as those which were proved in the case of *Regina v. Giles*, 26 O. R. 586, and the same contention was urged against the conviction as was unsuccessfully raised in that case.

We think we should follow the decision of the Chancery Division in the case referred to, and that that decision was a right one. We do not think that there is anything to indicate that section 198 was intended to apply only to events and contingencies of the kind mentioned in it when they should happen in Canada. The offence is that of keeping a disorderly

December 21, 1895. ARMOUR, C. J. :—

Judgment.

Armour, C. J.

All the questions reserved for our consideration must be answered in the affirmative.

From the admissions and evidence in the case, the conclusion can be reached without reasonable doubt that the business carried on at No. 112 Dundas street, that carried on at No. 74 Dundas street, and that carried on at No. 64 Dundas street, were all parts of one business: that of betting on horse races being run in the United States, in which one Bennett, who lived in Washington, was the central figure if not the owner.

The method adopted for carrying on the business was as follows: The better went to No. 112 Dundas street and deposited the amount he desired to bet to the credit of Bennett, and obtained a receipt for the amount, which he took to No. 74 Dundas street, shewed it to the defendant the keeper of the office at No. 74 Dundas street, who stamped it, and this being done, the better then and there telegraphed to Bennett how he wanted the amount of the receipt placed, and Bennett placed or had it placed for him: the result of the race on which the money was placed was announced at No. 74 Dundas street, and if the better won he went to No. 64 Dundas street and received the money won, paid to him there on a telegraph from Bennett.

There can be no doubt that the defendant was the keeper of the office at No. 74 Dundas street, that Bennett

derly house, that is to say a common betting house, and such a house is as much within the mischief which the law was designed to prevent, whether the betting is with regard to events or contingencies, happening within or beyond the limits of Canada. If the house were kept for the purpose of betting between persons resorting to it, I cannot think that the fact that the bets were made with respect to matters happening out of Canada would make the house any less a common betting house within the meaning of the section, and, if that be so, why should any more limited meaning be given to the other prohibited acts dealt with by sub-section (b) of section 197.

The objection that, as where the money was received by the accused no race had been arranged for upon which the money was to be bet, the

Judgment. was a person using it, and that it was used for the purpose of betting between persons resorting thereto and persons procured by Bennett, and so was a common betting house within the very words of section 197 of the Criminal Code.

The conviction must be affirmed.

FALCONBRIDGE, J.—(after setting out the case):—

The case of *Regina v. Smiley*, 22 O. R. 686, has no application to the one in hand. That case was decided under R. S. C. ch. 159, sec. 9 (now section 204 of the Code). The proceeding here is under section 197 of the Code, which aims at a different kind of offence. So that I think it is immaterial that the race is in a foreign country, and that the laying of the bet with the bookmaker is said to be done in a foreign country.

Nor can I see that the legality or illegality of the race in Virginia or the legality or illegality of the bets in Virginia forms an element of decision under the section we are now considering: *Regina v. Giles*, 26 O. R. 586.

The learned magistrate has found that there is evidence shewing a "connection" between the rooms at 112 Dundas street and 74 Dundas street, and he has therefore found that Bennett was a person using the premises 74 Dundas street, and that the bookmakers at the race tracks were persons procured and employed by said Bennett, and that defendant permitted the premises in question to be used for the purposes of betting between persons resorting thereto and the said bookmakers. The legal objections which I have referred to do not stand in the way, and I case does not come within the section cannot prevail; the words are on any event or "contingency of or relating to any horse race," etc.: section 197, sub-section (b) (i). There were doubtless several contingencies that would be required to happen before the money was to be payable to the person who had entrusted it to the accused, but they were all contingencies relating to a horse race.

The conviction must be affirmed.

ROSE, J., concurred.

am of opinion that on the facts so found and stated the Judgment defendant was properly convicted.

Falconbridge,
J.

The whole transaction is "a deliberate and scarcely disguised attempt to evade the Act": *per* Lord Coleridge, C. J., in *Davis v. Stephenson*, 24 Q. B., at p. 532.

I think the conviction should be upheld.

STREET, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

LEE V. LEE.

Alimony—Judgment Therefor—Default in Payment—Subsequent Judgment for Arrears in County Court—Effect of.

Where, after the recovery and registration of judgment in an alimony action directing payment to the wife of a yearly sum in quarterly instalments, she, on default being made in payment of two of the instalments, brought an action therefor in the County Court, and recovered judgment, she was, notwithstanding, held entitled to the usual order for the sale of the husband's lands for the realization of the alimony. *Semble*, that the judgment recovered in the County Court was a nullity.

THIS was a petition filed by the plaintiff for the purpose of realizing arrears of alimony, and came on for hearing before BOYD, C., on the 11th of December, 1894. Statement.

The petition shewed that the plaintiff had recovered a judgment against the defendant, requiring him to pay to the plaintiff for alimony, the yearly sum of \$250, payable quarterly on the 26th of March, June, September, and December, in each year; and that a certificate of the said judgment was duly registered in the registry office; that default had been made in the payment of the instalments due on the 26th days of March and December, 1895, for which the plaintiff had brought an action in the County Court of the county of Elgin, and recovered judgment; and had issued *fi. fu.* goods and lands, but that the *fi. fu.* goods had been returned *nulla bona*.

Statement. The petition also alleged that the defendant was the owner of certain lands, describing them, on which a dwelling house had been erected, but which had been destroyed by fire; and that, though insured, the insurance company had refused to pay the insurance money in consequence of the alleged non-compliance by the defendant of the terms of the policy, in not notifying the company of the existence of a chattel mortgage on his goods, the plaintiff alleging that in consequence thereof her claim for the payment of the alimony had been materially decreased.

The petition was for a reference to the Master, to take the accounts, for a sale of the land, and for payment of the proceeds into Court to meet the instalments due and to accrue due for the said alimony and costs.

F. E. Hodgins, for the plaintiff.

Tremeean, for the defendant.

December 11th, 1895. **BOYD, C.:**—

The usual order to realize out of the land the arrears of alimony charged thereon by the judgment of the Court, should be pronounced on this application.

I do not think, as to the cause shewn, that by recovering judgment in the County Court for two quarterly payments in arrear, the plaintiff has in any way displaced the charge. My present impression is that this County Court judgment is a nullity, though it is not needful so to decide on this occasion.

It is said by Vaughan Williams, J., in *Re Hawkins*, 1 Mans. Bank. Cas. 6, at p. 9, "that instalments of alimony" (*i.e.*, overdue) "though a debt for the non-payment of which a man may be sent to prison under the Debtors' Act, do not create such a debt that an action at law could be brought or a judgment obtained in any Court whatsoever for the non-payment of the debt."

The point was left open in *Aldrich v. Aldrich*, 23 O. R.

374, 379, and 24 O. R. 124, where the claim in the Division Court was restricted to the taxed costs directed to be paid by the judgment in the alimony suit, which were held to be a distinct demand severable from the rest of the judgment,—and presumably not subject to the vicissitudes attaching to alimony proper, which is always subject to the order of the Court. The measure of the plaintiff's charge on the land is to be on the footing of the judgment for alimony, disregarding the County Court judgment. Costs to be added to the claim.

Judgment.
Boyd, C.

G. F. H.

REGINA V. ROSE.

Municipal Elections — Personation — Conviction — Prior and Subsequent Enactment as to same Offence — Repugnancy — 55 Vict. ch. 42, secs. 167 and 210 (O.).

Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter.

This principle being applied to sections 167 and 210 of the "Consolidated Municipal Act 1892," a person convicted of personation under the former clause was discharged as illegally convicted on a return to a *habeas corpus*.

Robinson v. Emerson, 4 H. & C. 352, and *Michell v. Brown*, 1 Ell. & Ell., at p. 275, followed.

THIS was an application on a return to a *habeas corpus* Statement for the discharge of a defendant who had been convicted of an offence under section 167 of 55 Vict. ch. 42 (O.), the Consolidated Municipal Act, 1892, as set out in the judgment.

The application was argued on January 22nd, 1896, before BOYD, C.

Murphy, Q. C., for the defendant, contended that he could not be convicted of applying for a ballot paper in the

Argument. name of another person under section 167, as that section was inconsistent with, and repugnant to, the later section 210 providing pecuniary punishment for the same offence

John Cartwright, Q. C., for the Attorney-General, contended that section 167 was general in its application, and was not repugnant to section 210.

January 22, 1896. **BOYD, C.** :—

The defendant was convicted by the police magistrate upon a plea of guilty of an offence under section 167 (e), 55 Vict. ch. 42 (O.), the offence being charged as applying for a ballot paper in the name of another person, and was sentenced to one month's imprisonment with hard labour.

That is justified by sub-section 3, as the defendant was a person other than the clerk of the municipality. But the question arises whether this conviction is legal and valid in view of the subsequent provision as to the same offence, which is found in section 210 of the same Municipal Act.

This section is of more recent origin than section 167; it was introduced providing for this and other offences in 1891: 54 Vict. ch. 42, sec. 8. It is there said (sub-sec. 2), that "Every person who * * applies for a ballot paper in the name of some other person * * shall be deemed to have committed the offence of personation, and shall incur a penalty of \$200, and in default of the payment of the penalty and costs, the offender shall be imprisoned * * for a period of sixty days, unless the penalty and costs be sooner paid."

This is a noticeable variation from the penalty given under the earlier section, which renders the offenders liable to imprisonment for a term not exceeding six months, with or without hard labour: sec. 167, sub-sec. 3.

The first awards bodily punishment, and the last pecuniary punishment, and in default of satisfaction then imprisonment. I do not think they can be read together

or reconciled as cumulative punishment for the one offence ; nor do I think they can be left to stand as alternative punishments for the one offence at the option of the magistrate. The very essence of criminal law is that it should be certain in its sanctions, and so plainly expressed as to be intelligible to the sense of ordinary people.

Judgment.

Boyd, C.

I think that by the application of proper principles of construction and interpretation, that the law which is later in date as well as later in position in the statute book, must in case of inconsistency or repugnancy prevail against the earlier in time and place.

In *Robinson v. Emerson*, 4 H. & C. 352, Martin, B., said, at p. 355 : " Where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offence, the latter statute operates as a repeal of the former." And see *Attorney-General v. Lockwood*, 9 M. & W., at p. 391, per Abinger, C. B., and *Parry v. The Croydon Commercial Gas and Coke Co.*, 11 C. B. N. S. 579, affirmed 15 C. B. N. S. 568.

So it is succinctly put by Lord Campbell, C. J., in *Michell v. Brown*, 1 Ell. & Ell., at p. 275, the later enactment operates by way of substitution and not cumulatively, giving an option to the prosecutor or the magistrate.

The defendant should be discharged from illegal custody and the usual order for protection given.

G. A. B.

[QUEEN'S BENCH DIVISION.]

LONGBOTTOM

V.

THE CORPORATION OF THE CITY OF TORONTO.

Municipal Corporations—Negligence—Defective Sidewalk—Notice of Action—Pleading—57 Vict. ch. 50, sec. 13 (O.).

The defence of want of notice of action required by section 13 of the Municipal Amendment Act, 1894, in an action against a municipal corporation for injuries sustained through a defective sidewalk should be set up in the statement of defence if the statement of claim is silent on the point, and the Judge can then go into the circumstances, if any, which excuse the want or insufficiency of the notice.

And where the objection, in such a case, to the want of notice was not raised until after the evidence was closed, a motion for a nonsuit was refused.

Statement. THIS was an action brought to recover damages for injuries sustained through a defective sidewalk.

The action was tried at Toronto, on November 20th, 1895, before BOYD, C., and a jury.

At the close of the case judgment was moved for in favour of the defendants on the ground that no proper notice of the accident had been given to the defendants under section 13 of 57 Vict. ch. 50 (O.). The case was left to the jury, who brought in a verdict for \$500. The question of notice was reserved and was subsequently argued on January 18th, 1896.

H. L. Drayton, for the defendants. The plaintiff has no remedy at common law, and can only recover under the statute; her claim is strictly governed by its limitations: *Municipality of Pictou v. Geldert*, [1893] A. C. 524. The accident happened January 11th, 1895, and notice was not given until March 10th, 1895. The notice and its proof must be part of the plaintiff's case, and without it there can be no recovery under the statute. The want of notice need not be pleaded or proved. If absence of notice

ought to be pleaded, an amendment should be allowed. **Argument.** Amendments are in the discretion of the Court, and will be granted unless unfairly prejudicing or surprising the other side. There is no prejudice or surprise here.

A. M. Denovan, for the plaintiff. The defendants were liable to repair at common law: *Harrold v. Simcoe and Ontario*, 16 C. P. at p. 50. The defendants are not entitled to amend: *Verratt v. McAulay*, 5 O. R. 313; *McKay v. Cummings*, 6 O. R. 400.

Drayton, in reply. The authorities cited as to amendment do not apply. In them the statutory enactment contracted a common law liability, therefore strictness in pleading was required, while in this case the converse proposition applies, and the corporation position of no liability under the common law is affected by the statutory provision.

January 22nd, 1896. BOYD, C. :—

The notice required by 57 Vict. ch. 50, sec. 13 (O), in cases of injury from defective sidewalks, is to inform the corporation before action of the nature of the accident and the cause of it. This is doubtless to give the municipal authorities an opportunity of investigating the matter in all its bearings with a view to settling or contesting the claim.

This kind of notice and its intent have evidently been suggested by the like provision in the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30, sec. 13 (O), of which sub-sec. 5 contains these words: "The want or insufficiency of the notice * * shall not be a bar to the maintenance of an action, * * if the Court or Judge before whom the action is tried, * * is of opinion that there was reasonable excuse for the want or insufficiency, and that the defendant has not been thereby prejudiced in his defence."

That is almost in identical terms with the last clause of the section under which this motion for nonsuit is made.

Judgment. The Workmen's Compensation Act requires that the
Boyd, C. want or the insufficiency of the notice shall be pleaded :
sub-secs. 9 & 14.

Having regard to Con. Rule 402, that a defendant is to raise all such grounds of defence, as, if not raised on the pleadings would be likely to take the opposite party by surprise, I think that it is the proper practice for the defendant to set up want of notice in case the statement of claim is silent on the point, and then the point being presented on the pleadings, the Judge can inquire into the circumstances (if any) which excuse the want or the insufficiency of this notice. That inquiry has not been made here. See also on the general rule as to pleading want of notice in cases of statutory liability : *Kent v. The Great Western R. W. Co.*, 3 C. B. 714, *Edwards v. Great Western R. W. Co.*, 11 C. B. 588 ; *Davey v. Warne*, 14 M. & W. 199 ; *Mason v. The Birkenhead Improvement Commissioners*, 6 H. & N. 72.

There was no preliminary objection raised to the statement of claim in this case as being insufficient, and no observation was made as to want of notice till the close of the evidence, and just before the case went to the jury. No evidence was offered by the defendants, and I am not able to say that the defendants were prejudiced by the want of notice of injury within thirty days after the accident. The accident was in January and notice was given within two months afterwards in March, 1895, and some ten days before action. In April the sidewalk was repaired by the city.

There is no doubt on the facts and on the findings of the jury, that the plaintiff was injured in this case by reason of a broken or rotten plank in the sidewalk on Richmond street, which had been so out of repair since October, 1894, and it is fairly excusable as to both parties that neither should have noticed the change in the law as to this notice which was introduced by amendment, assented to in May, 1894, but which would not be practically promulgated till the publication of the statute at a later period in the year.

Altogether I am unwilling to turn the plaintiff round on this point, taken at the very close of the contest, where the jury have affirmed her claim to be meritorious. Judgment.
Boyd, C.

I make no order except that judgment be entered for the plaintiff with costs.

G. A. B.

[DIVISIONAL COURT.]

GUROFSKI V. HARRIS ET AL.

Fraudulent Conveyance—13 Eliz. ch. 5—Intent to Defeat Action for Tort—Creditor—Preference.

Where a conveyance of land was made by a father to a daughter, while an action for slander against the father was pending, of which the daughter was aware, in satisfaction of a *bonâ fide* pre-existing debt to the extent of the full value of the land :—

Held, that the conveyance being attacked under 13 Eliz. ch. 5, by one who became a creditor by judgment obtained in the action of slander three months after the conveyance, and there being no other creditors, the preferring of one creditor was no ground for setting aside the conveyance as fraudulent and void :—

Cameron v. Cusack, 17 A. R. 439, followed.

A plaintiff suing for a tort is not a creditor within the meaning of the Ontario statute as to preferences :—

Ashley v. Brown, 17 A. R. 500, followed.

ACTION brought by Julia Gurofski, on behalf of herself and all other creditors of the defendant Ettlestein Harris (otherwise called Harris Ettlestone), to set aside a conveyance dated 11th December, 1894, made by the defendant Harris to the defendant Amelia King, his daughter, of a certain cottage and lot of land in the city of Toronto, on the ground that the same was fraudulent and void as against the creditors of the defendant Harris. Statement.

The action was begun on the 1st March, 1895.

The statement of claim, delivered on the 9th March, 1895, alleged that on the 9th February, 1894, the plaintiff began an action against the defendant Harris for damages for slander, and on the 1st March, 1895, obtained judgment against him for \$700 and costs; that a writ of *fi. fa.* against

Statement. his goods and lands had been placed in the hands of the sheriff of the city of Toronto, who had been unable to realize thereon; that the defendant Harris, on or about the 12th December, 1894, and after the commencement of the action for slander, with the intent and object of delaying, hindering, and defrauding the plaintiff, conveyed to his co-defendant, without consideration, the lands mentioned; that the defendant King had knowledge and notice of the action of slander, and connived and colluded with the defendant Harris to defeat the plaintiff's claim.

The defendants denied all charges of fraud and collusion, disputed the status of the plaintiff as a creditor, and alleged that the defendant King was a *bond fide* purchaser of the land in question for value, the facts as to which are set out in the judgments, and without notice or knowledge of any evil or wrong intention on the part of her co-defendant.

The action was tried at Toronto on the 4th November, 1895, before ARMOUR, C. J., who found that when the conveyance was made the intention of both parties was to defeat the action of slander; and gave judgment setting aside the conveyance with costs.

The defendants appealed from this judgment, and their appeal was argued before a Divisional Court composed of BOYD, C., and ROBERTSON and MACMAHON, JJ., on the 17th January, 1896.

Watson, Q. C., for the defendants. *Cameron v. Cusack*, 17 A. R. 489, concludes this case. It was found in that case that an intent to defeat existed. The only distinction is that in that case an action had only been threatened when the impeached conveyance was made, while here it had been actually begun. In this case there is no finding by the learned Judge that a debt was not due by the father to the daughter, and the evidence completely establishes such a debt. I refer to *Hickerson v. Parrington*, 18 A. R. 635; *Campbell v. Roche*, *ib.* 646; *Ex p. Mercer*, 17 Q. B. D. 290; *Golden v. Gillam*, 20 Ch. D. 389.

F. E. Titus, for the plaintiff. If the conveyance was executed for a fraudulent purpose, valuable consideration is of no avail: see remarks of OSLER, J. A., in *Cameron v. Cusack*, 17 A. R. at p. 493. I refer also to *Barling v. Bishop*, 29 Beav. 417. Argument.

February 18, 1896. BOYD, C.:—

One important factor has not been passed upon by the trial Judge—one which appears to me decisive of the case in the defendants' favour. Though it is found that the deed impeached was made with the intention to defeat the action for slander then pending, yet no reasons are given, and there is no finding impeaching the credibility of the witnesses who affirm that there was a debt subsisting between father and daughter. Having carefully read and compared all the evidence, I am led to believe that a debt to the extent of \$600—the full value of the land—is satisfactorily proved to have existed, and in satisfaction of which this conveyance was made and accepted. The daughter had been in business some seven or eight years before her marriage, and had realized considerable sums out of her business, as the evidence of the deposits in the savings bank and the parol testimony indicate. It cannot be doubted that enough moneys were in her hands where-with to lend the various amounts which were afterwards summed up in the one note of 13th January for \$300 given on the eve of her marriage, and the other sum of \$300 given on the 6th January, 1892, for which the note of that date was taken. That this \$300 was paid by the daughter to the father, and by him expended in the wedding festivities, according to the custom of the Jewish people, is well proved by father, daughter, husband, and brother. And there is nothing going counter to this evidence. As to the other \$300, Silverstone, an independent witness, proves the lending of the last \$150 by the daughter to her father, and also a statement then made between them acknowledging that another \$100 had been lent shortly

Judgment. before. An independent witness, Manton, also proves that
Boyd, C. the father was trying to raise a loan on the land in question in the fall or in the middle of 1891, out of which to pay his daughter money he had borrowed. He had at that date borrowed, according to father and daughter, at least \$150, or at most \$275, for there is some variation in the details—which is not surprising, as some years have elapsed, and no entries were made of it, and the father is illiterate—and the whole was closed by the note taken in 1892. There is a credible account given of how and why the two notes were taken in 1892; they were written out by the brother Abraham, who is the scribe of the family, and were kept by the daughter after her marriage, and delivered up by her to her father after she received the conveyance of the land.

She and her husband went to Rochester directly after the marriage, and lived there for eighteen months, and after the first note was due at the end of a year, repeated demands for payment were made. These were renewed and repeated after Mr. and Mrs. King returned to Toronto in the summer of 1893. The father tried to raise money on the lot to meet the claim, but was unable to do so, and then turned it over to pay the whole, by the advice of his solicitor.

The attack being under the Statute of Elizabeth—by one who became a creditor by reason of the judgment obtained in her action of slander three months after the conveyance—and there being no other creditors, it is shewn by the case of *Cameron v. Cusack*, 17 A. R. 489, that the preferring of one creditor, even though there be an impending action for tort of which both are aware, is no ground for displacing the transaction as fraudulent and void. If there was a debt between father and daughter, and the conveyance was in satisfaction of that debt, I take it that the plaintiff is out of Court.

The finding of the trial Judge, which is a conclusion of law, leaves it open for the appellate Court to deal with the facts; and upon the evidence I have no reasonable doubt that the defence of valuable consideration is established.

In my opinion, the action should be dismissed with Judgment.
costs. Boyd, C.

As to the form of the notes—being without interest—that is the ordinary way in which Jews deal with each other—not exacting money from one of their own kindred. Special expenditure on a marriage feast is also a Jewish custom of great antiquity.

In addition to what is said by my brother MacMahon as to the law, I would note that the plaintiff suing for a tort is not a creditor within the meaning of the Ontario statute as to preferences: *Ashley v. Brown*, 17 A. R. 500. As a subsequent creditor by judgment, the plaintiff cannot attack a prior deed for adequate value where no debts still unpaid were existing at the time of the execution of the deed, for it is not shewn that the transaction was colourable or entered into with a view to incur future obligations: *Smith v. Tutton*, 6 L. R. Ir. at p. 43 (1879). And so far as the Statute of Elizabeth is concerned, there is nothing to prevent a person indebted *bonâ fide* conveying property to satisfy one of his creditors, in preference to holding it subject to the contingencies of pending litigation for tort: *Middleton v. Pollock*, 2 Ch. D. at p. 108; *McMaster v. Clare*, 7 Gr. at p. 558.

A distinction is to be marked in the cases between selling to a stranger and handing over property to an existing creditor in satisfaction of his claim. In the latter case no provision of the Statute of Elizabeth is invaded, and its policy is not thereby frustrated. The scheme of the Act was to provide that a man's property should go to pay his creditors, or some, or one of them; but it was not intended to provide for ratable or other distribution among the mass of his creditors. Applying to this case the decisions under the Statute of Elizabeth, and having regard to the parliamentary exposition of that statute given by the Ontario Legislature in R. S. O. ch. 96, sec. 3, I think the case of *bonâ fide* satisfaction of the claim of one creditor is not within the mischief which the Act strikes at.

Judgment. ROBERTSON, J. :—

Robertson, J.

I fully concur in this judgment.

MACMAHON, J. :—

The only judgment delivered by the learned Chief Justice of the Queen's Bench, who tried this case, was: "I think that when this conveyance was made the intention of the parties was to defeat this action. I have no doubt about that, and I set aside the conveyance."

A conveyance for valuable consideration by a debtor to one creditor is not void merely because it is made for the purpose of defeating a particular creditor; for a debtor is not, by the statute 13 Eliz. ch. 5, precluded from preferring one creditor to another. So long as it is shewn that the person to whom the conveyance or mortgage is made is a *bonâ fide* creditor, that is all that is required. For the *bona fides* referred to in the statute means that the instrument is not being used as a covering for preserving the property for the grantor or mortgagor: see *Ex p. Gumes*, 12 Ch. D. 314 at p. 324; and the judgment of Giffard, L.J., in *Alton v. Harrison*, L. R. 4 Ch. at p. 626; *Totten v. Douglas*, 18 Gr. at p. 352.

The Act of 1872 (now R. S. O. ch. 96, sec. 1) explaining 13 Eliz., was, as pointed out by Osler, J. A., in *Cameron v. Cusack*, 17 A. R. at p. 493, passed merely for the purpose of declaring that it had not been properly expounded in *Smith v. Moffat*, 28 U. C. R. 486. The Provincial Act merely provides that valuable consideration and intent to pass the interest of the grantor shall not prevent the application of sections 1 and 2 of 13 Eliz. ch. 5, unless the property was acquired *bonâ fide* and without notice or knowledge on the part of the purchaser of any fraud or intended fraud by the vendor. That Act in no way interferes with the right of a debtor to prefer one creditor to another—a right which was not abridged by the Act of Elizabeth.

If, therefore, the defendant was a creditor of her father, Harris Ettlestone, I take it that the fact that her father intended by the conveyance to her to defeat some person who might become a creditor, and that she was aware that the deed would have that effect, would not alone defeat the conveyance.

Judgment.
MacMahon,
J.

But there is the strongest evidence that the defendant was pressing for payment, and that her father was endeavouring to sell the cottage, and had promised that when a sale was effected he would pay her claim. When the conveyance was executed and given to the defendant, the father may have had it in his mind to defeat the plaintiff's claim; but there was no evidence that the defendant was aware of such intent. In fact, the action for slander brought by the plaintiff against Harris Ettlestone the former offered to settle on payment of \$25, but the suit was apparently regarded as so frivolous and of such little moment that settlement even on those terms was declined. As said by Lindley, L. J., in *Ex p. Mercer*, 17 Q. B. D. at p. 301: "At all events, the result of it" (an action for breach of promise of marriage in that case) "was in the highest degree speculative; he was not indebted to the plaintiff, but she had made a claim against him which might or might not result in damages." That case has no bearing on the present, if, as contended here, the defendant was, at the time of the conveyance made, a creditor of her father; because that (the *Mercer Case*) was the case of a voluntary settlement in favour of the settlor's wife; and I merely refer to the view entertained by the Lord Justices in appeal, where such a settlement is sought to be set aside by a creditor who at the time the settlement was made has not recovered judgment; and who was merely a litigating plaintiff in an action of tort brought against the settlor.

The Chief Justice not having found on the question as to whether the defendant was a creditor, and as that is the question on which the judgment mainly hinges, we have to deal with it on the evidence before us. And I agree with the learned Chancellor in holding that there was

Judgment. ample evidence of an indebtedness. And, in addition to
MacMahon, what is said in the Chancellor's judgment, I want to point
J. out that the defendant at one time, in 1889, had to her credit in the savings bank the sum of \$1,383.80, and she on two occasions during that year deposited \$600, and on another occasion \$300. On one occasion in July, 1890, she deposited \$425, and in July, 1891, she made a deposit of \$600. The deposits of these large sums go to shew that she was in the habit of keeping considerable sums of money about her from which the money lent her father could be paid without having to resort to payment by cheque. And as I see no portion of a deposit in the savings branch of the Dominion Bank (where she kept her account) can be withdrawn unless upon production of the depositor's pass book, that would be a very good reason for not giving her father cheques for the money lent him.

If there is anything in the property beyond the amount of the defendant's claim, the plaintiff should have the right to treat the deed as a mortgage and make what she can out of the equity of redemption; otherwise I agree that the action should be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

BELANGER V. MENARD.

Bill of Sale—Fraud—Possession—Onus.

The due registration of a bill of sale prevents the inference of fraud being drawn from the retention of possession of the goods by the bargainer. *Cookson v. Swire*, 9 App. Cas. at pp. 664-5, specially referred to. Judgment of the County Court Prescott and Russell reversed.

THIS was an appeal from the County Court of Prescott and Russell in an interpleader issue as to certain goods and chattels claimed by the plaintiff in the issue, determining that the plaintiff was not entitled to them as against the execution creditor. Statement.

The plaintiff rested his case upon the production and proof of a bill of sale of the goods in question from the execution debtor to him, which was duly registered in accordance with the provisions of the Bills of Sale and Chattel Mortgage Act, 1894, and proof that the debtor was at the time the bill of sale was executed in possession of them. It appeared from the plaintiff's evidence that the execution debtor was indebted to the defendant in the issue in the sum of \$450 at the time the bill of sale was given, and that proceedings had been taken to recover this indebtedness about that time; that four days before the execution of the bill of sale the debtor had executed to the plaintiff a conveyance of his farm; that the plaintiff at the time of these transactions was a school teacher, residing at the village of Alfred, about five miles from the residence of the debtor, which was upon the farm conveyed; that, though the bill of sale and conveyance were absolute in form, the debtor continued to reside on the farm and in possession of the goods, and was so in possession when the latter were seized by the sheriff; and that the debtor was possessed of no other personal property upon which the sheriff could levy under the writ in his hands.

The learned Judge, having found these facts, determined that they raised so strong a presumption of the transaction

Statement. between the debtor and the plaintiff being colourable and fraudulent, as against the creditors of the debtor, as to throw upon the plaintiff the onus of proving the *bona fides* of it by some proof beyond the production and proof of the instruments under which he claimed, although these were formally executed and registered; and he having so intimated that opinion, the plaintiff's counsel elected to rest his case upon the evidence put in.

The learned Judge thereupon decided the issue against the plaintiff; and the appeal was brought from this judgment.

The appeal was argued before a Divisional Court composed of MEREDITH, C.J., and ROSE and MACMAHON, JJ., on the 12th February, 1896.

Shepley, Q.C., for the plaintiff. The Judge held that the plaintiff should have gone on and shewn good faith, but that is not necessary: *Furlong v. Reid*, 12 O. R. 607; *Squair v. Fortune*, 18 U. C. R. 547.

[MEREDITH, C.J.—We will hear the other side.]

J. B. O'Brian, for the defendant. The cases cited were cases of chattel mortgages. This is a bill of sale. The distinction is this, that where the transfer is in form absolute, and the transferor continues in possession, a presumption of fraud arises: *Taylor on Evidence*, ed. of 1895, secs. 150, 150a; *May on Fraudulent Conveyances*, 2nd ed., pp. 136-8; *Twyne's Case*, 1 Sm. L. C., 8th ed., p. 1; *Edwards v. Harben*, 2 T. R. 587; *Martindale v. Booth*, 3 B. & Ad. 498; *In re Daniel, Ex p. Ashby*, 25 L. T. 188. Other badges of fraud are present here, as found by the learned Judge.

Shepley, in reply. The language of the cases cited in opening is just as applicable to a bill of sale as a chattel mortgage. At all events, there is no room for the distinction since the Bills of Sale Act. It is a question of title, not of possession.

February 17, 1896. MEREDITH, C.J.—(after setting out the facts as above):—

Judgment.
Meredith,
C.J.

I am unable to say that the inference which the learned Judge drew was not one that upon the facts proved he might not properly have drawn, and had it not been for his ruling that the mere retention of possession by the bargainor, although the bill of sale was duly registered under the Bills of Sale and Chattel Mortgage Act, 1894, raised a presumption of fraud which it was incumbent upon the plaintiff to rebut, I should have been of the opinion that the appeal should be dismissed.

That ruling was, however, in my opinion, erroneous.

In *Edwards v. Harben*, 2 T. R. 587, the opinion was expressed that the presumption arising from such retention of possession was one of law, and conclusive against the bargainee; but the later cases have modified that view, and determine that the presumption is one of fact which may be rebutted by evidence of good faith: see *Martindale v. Booth*, 3 B. & Ad. 498; and the notes to *Twyne's Case*, 1 Sm. L. C., 8th ed., p. 1; *Macdona v. Swiney*, 8 Ir. C. L. R. 73.

This rule was established before the passing of the Bills of Sale Act, and no case was cited, nor have I been able to find one, in which since that Act was passed it has been held that the presumption arises—nothing else being proved than the absence of a change of possession—where the bill of sale has been registered under the Act.

The principal, if not the only, ground upon which the presumption was based was the secrecy of the transaction, and where that element was absent, the notoriety of the transfer was always a strong circumstance to rebut it: see *Latimer v. Batson*, 4 B. & C. 652; *Leonard v. Baker*, 1 M. & S. 251; *Watkins v. Birch*, 4 Taunt. 823; *Jezeeph v. Ingram*, 8 Taunt. 838; *Kidd v. Rawlinson*, 2 B. & P. 59; *Cole v. Davies*, 1 Ld. Raym. 724.

This being so, it follows, I think, that the registration of the bill of sale, and the consequent publicity given to the

Judgment. transaction which it evidenced, ought to prevent the inference of fraud being drawn from the mere fact of the retention of possession by the bargainor.
Meredith, C.J.

This view is supported by the opinion of Lord Blackburn in *Cookson v. Swire*, 9 App. Cas., at pp. 664-5; he there refers to the rule of the common law established by the cases to which I have referred, and points out that the Bills of Sale Act was designed to put a stop to the evils which resulted from the application of the rule which he mentions; and he goes on to say:—"The Act says, where there is a bill of sale * * * that shall within a short time be registered, and two things are to follow from it. In the first place its being registered will put an end to any fear that any one should start forward afterwards and say, the transaction being kept secret is a proof that it was a sham transaction, for, it being actually registered as bills of sale are required to be, it could no longer be secret, and there would be no badge of fraud in that respect. The other was, if it be not registered, then so long as the goods are in the apparent possession of the person to whom they originally belonged, so long it shall be void as against a certain class of persons, namely, execution creditors, and various other persons that were named."

This judgment of Lord Blackburn is referred to in Campbell on Sales, 2nd ed., as "a weighty judgment," of "a very high authority upon questions of principle applied to commercial law."

See also *Crawcour v. Salter*, 18 Ch. D. at p. 43.

The appeal should, therefore, in my opinion, be allowed, and there should be a new trial, and the costs of the last trial and of the appeal should be costs in the cause.

ROSE, J. :—

I quite agree. I am content to rest upon the opinion of Lord Blackburn in *Cookson v. Swire*, set out in the judgment of the learned Chief Justice, as a correct exposition of the law, although no other Judge referred to the point in that case.

It follows, therefore, that unless the other facts of this case warrant a finding for the defendant, the judgment appealed from is erroneous; and I think the case should go back for reconsideration.

Judgment.
Rose, J.

MACMAHON, J. :—

I entirely concur.

E. B. B.

[COMMON PLEAS DIVISION.]

WESTERN BANK V. COURTEMANCHE.

Chattel Mortgage—Insurance Pursuant to Covenant—Assignment of Mortgage—Equitable Assignee of Insurance Money—Application of Payments.

Promissory notes for the purchase money of goods were secured by a chattel mortgage given on behalf of the purchasers containing a covenant to insure for the benefit of the mortgagee, who discounted the notes with the plaintiffs and assigned the chattel mortgage but did not transfer the insurance to them, the loss under which was payable to himself. The policy was afterwards renewed by the purchasers' firm, but it did not appear that the renewal was assigned to the mortgagee, or the loss made payable to him. Subsequently a fire occurred and the purchasers' firm assigned the insurance money to the plaintiffs, with whom they kept an account, as security for their general indebtedness, and the plaintiffs received and applied it on the notes above mentioned, but afterwards sought to apply it in payment of other indebtedness of the purchasers :—

Held, that the plaintiffs were bound to apply the insurance money, for the benefit of the mortgagee, who was the equitable assignee of the policy under which the money was paid, and entitled to have it applied in payment of the notes to pay which as between him and the purchasers it was primarily applicable, and the plaintiffs took the money subject to the equitable rights of the mortgagee of which they had notice.

THIS was a motion by the defendant Courtemanche before the Divisional Court of the Common Pleas Division, by way of appeal from the decision of FALCONBRIDGE, J., in this action. The facts of the case are stated in the judgment of MEREDITH, C. J.

Argument. The motion was argued on November 19th, 1895, before MEREDITH, C. J., and ROSE, J.

Hewson, for the plaintiff, referred to *Ryan v. McConnell*, 18 O. R. 409.

D. O'Connell, for the defendant, Courtemanche, referred to *Burr v. Boyer*, 2 Neb. 265, 271; *Strange v. Fooks*, 4 Giff. 408.

D. O. Cameron, for Edwin Dyson, third party, referred to R. S. O. ch. 102, sec. 4, sub-sec. 2.

January 11th, 1896. MEREDITH, C. J. :—

Motion by the defendant, Courtemanche, by way of appeal from the judgment of Mr. Justice Falconbridge, before whom this action was tried at the last Spring Assizes at Barrie, without a jury, which was for the plaintiffs for the full amount of the promissory notes sued on.

Promissory notes of which those sued on were renewals made by one Edwin Dyson, payable to the order of the defendant Gillespie, were given to the defendant, Courtemanche, in part payment of the price of a stock of goods sold by him to Dyson & Gillespie.

The stock of goods was, by arrangement between the parties, transferred by Courtemanche to Dyson by bill of sale, dated May 4th, 1892, and for securing the unpaid purchase money Dyson executed to Courtemanche a chattel mortgage bearing the same date upon the stock purchased and upon any similar goods to those of which the stock was composed, which should be afterwards acquired or purchased to replenish it.

By the chattel mortgage Dyson covenanted with Courtemanche to insure and keep insured the goods covered by it for \$9,000, as security for the mortgage moneys, for the benefit of Courtemanche, his executors, administrators and assigns, and to pay the premiums required to be paid in respect of such insurance; and it was further provided that "the loss, if any, should be payable" to Courtemanche, his executors, administrators, or assigns.

In compliance with the terms of this covenant, Dyson and Gillespie effected two insurances on the stock of \$2,500 each, one in the Royal, and the other in the Lancashire Insurance Company. The policies were either assigned to Courtemanche, or were by their terms made for his benefit and were delivered to him.

These policies having expired, the insurances were renewed by Dyson & Gillespie. The renewal policies, if any were issued, were not produced at the trial, nor did it appear whether by the terms of them the loss was made payable to Courtemanche, and they were not assigned to him.

On February 28th, 1894, while the renewal policies were in force, a fire occurred, and the stock of Dyson & Gillespie was partially destroyed and damaged.

The amount of the insurance upon the stock was \$13,000, and the loss was adjusted at \$9,000, of which \$1,670.81 was the share payable by the Royal Insurance Company upon its policy.

Courtemanche discounted with the plaintiffs the promissory notes, of which those sued on are renewals, and on March 11th, 1893, assigned the chattel mortgage to the plaintiffs as security for his indebtedness to them, and for a further advance, the promissory notes or renewals of them being part of that indebtedness, and a duplicate original of the chattel mortgage was given by Courtemanche to the plaintiffs' manager.

There was conflicting evidence as to whether the policy in the Royal was at this time assigned to the bank, Courtemanche alleging that it was, and the plaintiffs' manager asserting the contrary. The proper conclusion upon the evidence is, I think, the onus being on Courtemanche to establish the fact of the transfer and the probability, had there been an assignment of the fact being easy of proof by means of the documents in the possession of the insurance company, that it is not proved that any such transfer was made.

The plaintiffs' manager, Mr. Spring, was also the local

Judgment.
Meredith,
C.J.

Judgment. agent of the companies with which the insurances were effected, and acted for them in effecting them. On April 11th, 1894, Dyson & Gillespie assigned to the plaintiffs the moneys payable on the Royal Insurance Company's policy as security for their indebtedness to the plaintiffs.

Meredith, C.J.

The plaintiffs subsequently received from the Royal Insurance Company under the authority of this assignment, \$1,670.81, and applied it so far as was requisite for that purpose, to the payment of the notes sued on when they respectively matured.

Gillespie, one of the firm of Dyson & Gillespie, some months after this application had been made, finding that the account of the firm with the plaintiffs was, owing to its having been made, overdrawn, objected to it, basing his objection upon the contention that the plaintiffs had no right to so apply the insurance moneys without the authority of the firm. In this contention, the plaintiffs acquiesced under the advice of their solicitor, who appears to have entertained the view that the application which had been made was unauthorized, and they made in the account of the firm, entries crediting it with the notes which had been charged to the account, and the balance which was then left at the credit of the firm, was subsequently withdrawn by it.

Dyson was called as a witness, and he testified that the renewals of the two insurance policies were effected in pursuance of the covenant in the chattel mortgage, and that he had directed the plaintiffs to apply the moneys received from the Royal Insurance Company to the payment of the notes sued on.

Such are the material facts, and the question which arises upon them is, whether the plaintiffs are now entitled to recover as against Courtemanche on the notes sued on.

It appears to me that they are not. The insurance moneys received from the Royal Insurance Company were, I think, clearly as between Dyson & Gillespie and Courte-

manche, primarily applicable to pay the notes sued on. Dyson acting for the firm and holding the stock in trust for it, had covenanted to insure the stock for \$9,000 for the benefit of Courtemanche, as security for the payment of the notes; an insurance of which that in respect of which the \$1,670.81 were recovered was a renewal, was effected in pursuance of that covenant, and Courtemanche thus became equitable assignee of the policies and entitled to have the moneys which became payable under them, applied in payment of the notes.

Judgment.
Meredith,
C.J.

The assignees of the firm took subject to the equitable rights of Courtemanche, of which they had notice. They were assignees and had possession of the chattel mortgage which contained the covenant to insure and their manager had notice of the insurances being effected for the benefit of Courtemanche in pursuance of the covenant. The application, therefore, of the insurance moneys when they came to the hands of the plaintiffs to the payment of the notes sued on, was one that the plaintiffs were not only entitled but bound to make, and upon receipt of those moneys by the plaintiffs the liability of Courtemanche came to an end the debt for which he was liable having been satisfied.

Courtemanche is therefore entitled to succeed on this ground and it is unnecessary to decide the other questions raised by him, though such consideration as I have given to them has not led me to a conclusion different from that reached by the learned Judge at the trial, whose attention does not appear to have been specially drawn to the ground of defence on which the defendant has succeeded.

The appeal is allowed with costs and the judgment of the learned Judge reversed and judgment will be entered dismissing the plaintiffs' action with costs.

ROSE, J., concurred.

A. H. F. L.

[COMMON PLEAS DIVISION.]

BROOKE V. GIBSON.

Statute of Limitations—Trespasser—Possession—Tax Title—R. S. O. ch. 111, sec. 5, sub-sec. 4—Construction of.

A person claiming title by possession to land derived through prior trespassers, and by his own possession, can only acquire a title to the land of which there has been actual possession for the statutory period. Sub-sec. 4 of sec. 5 of the Real Property Limitations Act, R. S. O. ch. 111, requiring twenty years' possession as to non-cultivated lands, only operates in favour of the patentee and those claiming under him, and not to a title acquired under a sale for taxes.

Statement. THIS was an action tried before MEREDITH, C. J., at the Autumn, 1895, non-jury Sittings, at Belleville, when he reserved his decision.

Hamilton Cassels, for plaintiff.

E. Guss. Porter, for defendant.

Subsequently the learned Chief Justice delivered the following judgment in which the facts are stated :

January 4, 1896. MEREDITH, C. J. :—

The action was to recover possession of the north half, south-east quarter, and twenty acres of the south-west quarter, of lot number 18, in the 8th concession of the township of Marmora.

The plaintiffs' title is derived from sales for arrears of taxes made under the provisions of the Assessment Act, and tax deeds were made to their testator on the 6th November, 1868. The land was patented land.

The defendant is a married woman, the wife of Robert Gibson, who is not a party to the suit ; and her defence, which covers the whole of the land claimed by the plaintiff, is based on the Statute of Limitations.

It was proved that the defendant, or her husband, was upwards of twenty-nine years before the trial let into possession of the lot by a man named Holland, who had been

in possession of part of it for some years previous, he having bought it from a Mrs. Hughes, who was in possession of part of it which was then enclosed with lot 17 which she owned. Neither Mrs. Hughes nor Holland appear to have had any title to any part of the lot.

Judgment.
Meredith,
C.J.

When the defendant or her husband was let into possession about twenty or twenty-five acres were cleared and cultivated; a house was subsequently built, and the clearing has been from time to time extended, until at the time of the trial about seventy-five acres were cleared and fenced, all of which, except about four acres, was cleared and fenced upwards of eleven years before the commencement of this action, the four acres having been cleared and fenced within ten years: the possession of the defendant or her husband has been continuous and uninterrupted since it began of the part cleared and fenced for eleven years.

I do not think that the defendant has proved such possession of that part of the land which has not been cleared and fenced for eleven years,—the possession being originally that of mere trespassers—as extinguished the right of the plaintiffs; and therefore as to that part of it the plaintiffs are entitled to succeed.

A good deal of evidence was given to shew that the land was given by Holland to the defendant, and that such possession was hers and not that of her husband; but it is not, I think, necessary to determine whether the title gained by the operation of the Statute of Limitations is in the defendant or in her husband, as in either case it seems to me the plaintiffs must fail. If, in the defendant, there is an end of the question; and, if in the husband, that is sufficient to answer the plaintiff's claim, and to entitle the defendant to prevent any interference with her possession.

It was contended by Mr. Cassels, for the plaintiffs, that sub-sec. 4 of sec. 5 of the Real Property Limitation Act (R. S. O. ch. 111), applies, and that the defendant, if entitled to rely on the possession at all, can succeed only as to

Judgment. that part of the land of which there has been possession
Meredith, for twenty years.*

C.J.

The sub-section in my opinion does not apply. It operates in favour only of the patentee and those claiming under him; and the plaintiffs and their testator are not, I think, persons claiming under the patentee; they claim not under him, but under the tax deeds—a statutory title derived from the sale of the land for taxes. The tax sale creates a new title, and the land passed to the testator “dissevered, as it were, from any previous ownership or claim of interest”: Black on Tax Titles, 2nd ed., 420, *et seq.*; or as put by the present Chief Justice of Ontario in *Cushing v. McDonald*, 26 U. C. R. 605, the estate of the patentee “wholly ceased or was forfeited by the sale for taxes * * and a new estate with a right of entry vested in the plaintiff”: p. 609.

The defendant is therefore entitled to succeed as to the seventy-one acres of which possession has been had for the full statutory period applicable to this case (ten years).

If there be any difficulty found in defining the four acres of the present clearing and enclosure, the case may be spoken to and provision made by reference or otherwise for more certainly designating the seventy-one acres as to which the defendant succeeds.

The case is not one in which either party should pay or receive costs.

G. F. H.

* By that sub-section, the lapse of ten years is no bar to the grantee of the Crown or person claiming under him, who is in ignorance of actual possession having been taken of lands in a state of nature, but no action shall be brought after twenty years from possession taken.

[CHANCERY DIVISION.]

PATRICK ET AL. v. WALBOURNE ET AL.

Lien—Mechanics' Lien—Prior Mortgage—Increased Value—Rights of Lienholder and Mortgagee—Destruction of Property—Period of Ascertainment of Value.

Where on a reference in a mechanics' lien proceeding, it is found as between a lienholder and a prior mortgagee, that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lienholder, who under sub-section 3 of section 5 of the Mechanics' Lien Act, is declared entitled to rank on such increased value in priority to the mortgage, and pending the proceedings the premises are destroyed by fire, the claim of the lienholder is at end so far as the interests of the mortgagee are affected by it.

Semble, The amount of the increased value to which the lienholder is entitled to resort as against the mortgagee cannot be ascertained until the property has been sold.

THIS was an appeal from a judgment of FALCONBRIDGE, *Statement*. J., in a mechanics' lien proceeding.

The matter was referred to an official referee, who allowed the lienholders' claims, ascertained that the selling value of the premises had been increased to an amount equal to the claims of the lienholders by the work done and materials supplied, and declared the lienholders entitled to rank on that increased value in priority to certain prior mortgages on the premises, although the buildings had been destroyed by fire pending the proceedings.

The other facts appear in the judgment of MEREDITH, C. J., in the Divisional Court.

The mortgagees appealed from the report of the referee, and the appeal was argued in Court on the 3rd September, 1895, before FALCONBRIDGE, J.

Aylesworth, Q. C., for the mortgagees.

James Bicknell, for the lienholders.

Judgment. January 4, 1896. FALCONBRIDGE, J. :—

Falconbridge,
J.

On the main point involved in the appeal no authority was cited to me, and I presume none was cited to the learned special referee. There is no Canadian authority. In the United States, where all points arising under Acts similar to ours have been much discussed and elaborated, there are judgments favouring both views.

There can be no doubt that the lien conferred an insurable interest: *Franklin Fire Insurance Co. v. Coates*, 14 Md. 285; *Insurance Co. v. Stinson*, 103 U. S. 25.

In two States it has been held that a mechanics' lien is not terminated by the destruction of the building by fire—that it may, notwithstanding, be enforced against the land on which it was situated or against the débris: *Freeman v. Carson*, 27 Minn. 516; *McLaughlin v. Green*, 48 Miss. 175.

And in Iowa if the improvements are removed or destroyed the lien still clings to the land: *Clark & Co. v. Parker*, 58 Iowa 509.

I prefer the reasoning and the conclusions of the Supreme Court of Pennsylvania, construing a statute which gives a lien on the building and which declares such lien to "extend to the ground covered by such building and to so much other ground immediately adjacent thereto and belonging in like manner to the owner of such building as may be necessary for the ordinary and useful purposes of such building."

In two cases which are apparently cited with approval by Mr. Phillips (*Phillips on Mechanics' Liens*), 3rd ed., p. 19 *et seq.*, that Court has affirmed the principle that the equity of a mechanics' lien does not extend to the ground upon which the building is erected or which is adjacent to it except where it is necessary to the enjoyment of the building.

So if the building for which the materials were furnished or labour done is consumed before a mechanics' lien is filed, the ground upon which such building was erected and all

future buildings upon it are discharged from such lien: Judgment.
The Presbyterian Church v. Stettler, 26 Pa. 246.

Falconbridge,
 J.

And in *Wigton & Brooks' Appeal*, 28 Pa. 161, the section is extended to cases where the lien has been filed before the destruction, because it is said that *a fortiori* is it the case where the destruction precedes the entry of the lien.

I am of opinion that the wording of our statute lends itself equally to this view.

The judgment of the learned referee will be varied in so far as it awards to the lienholders priority over the mortgages of the appellants, with costs here and below to be paid by the lienholders to the appellants.

Costs of this appeal to be costs as of an appeal in Chambers: 53 Vict. ch. 37, sec. 35 (O.).

From this judgment the lienholders appealed to a Divisional Court, and the appeal was argued on February 7th, 1896, before MEREDITH, C. J., ROSE and MACMAHON, JJ.

James Bicknell, for the appeal. The selling value of the property having once been increased by the lienholders, the lien attaches permanently. Matters *pendente lite* are not to be considered. After the liens were filed and had attached, and especially after their priority to the mortgages had been settled by the proper authority, they cannot be displaced by a fire. Sub-section 3 of section 5 R. S. O. ch. 126 was substituted for section 7 R. S. O. ch. 120 (1877), and should receive the same construction: Holmsted, p. 30; Brightly's Purdon's Dig. (Pa.) 12th ed., 1894, 1311. In the United States a lien does not attach before filing. In one case, *The Presbyterian Church v. Stettler*, 26 Pa. 246, referred to by the learned Judge, the fire occurred, and in another the building was prostrated by a storm before the lien was filed. I refer to *Steigleman v. McBride*, 17 Ill. 300, and the cases in Iowa and Mississippi referred by FALCONBRIDGE, J., in his judgment.

Aylesworth, Q. C., *contra*. The lien given by the statute

Argument. is not on the land but on the estate and interest only of the owner. The words "increased value" mean in this case the building. Under the old statute, R. S. O. ch. 120 (1877), the mortgage was first and the lien second. Under R. S. O. ch. 126 as to the increased value the lien is first and the mortgage is second, but it is only in respect to the increased value the lien is so to rank. Increased value does not mean original value and the increased value: *Wigton & Brooks' Appeal*, 28 Pa. 161.

Bicknell, in reply. There is no distinction between land and buildings.

February 10, 1896. MEREDITH, C. J. :—

Appeal from an order of Falconbridge, J., allowing an appeal by the mortgagees from the report of the special referee under the provisions of 53 Vict. ch. 37 (O.).

The proceedings were taken by the plaintiff as a lienholder to enforce his rights as such against certain lands in Woodstock, of which the respondents are prior mortgagees within the meaning of the Mechanics' Lien Act, R. S. O. ch. 126, and they were begun on the 11th March, 1893.

By the report of the referee the claims of the plaintiff and certain other lienholders were allowed; the respondents were found to be prior mortgagees within the meaning of the Act; the selling value of the mortgaged premises was ascertained to have been increased to an amount equal to the claims of the lienholders by the work done and the materials supplied by them respectively; they were declared to be entitled to rank on that increased value in priority to the mortgagees, and the lienholders were reported to be first in priority, the mortgagees Hughes and Barwick, second, and the mortgagees the Oxford Permanent Loan and Savings Society, third or last in priority; and the referee reported specially that the building erected on the mortgaged premises, in respect of which the claim of the lienholders arose, was on the 23rd

December, 1893, destroyed by fire, and that in respect of the loss the sum of \$6,225 was paid by the insurance companies to the second mortgagees and was applied by them on their mortgage.

Judgment.
Meredith,
C.J.

The mortgagees appealed from the report, their main contention being that the building having been destroyed the lien was at end, so far as they were affected by it. My brother Falconbridge was of that opinion and allowed the appeal, and the present appeal is from his order allowing the appeal from the report.

The American cases cited on the argument appear to me to afford little or no help in determining the question in controversy, as far as the solution of it depends on the meaning of sub-section 3 of section 5 of the Mechanics' Lien Act, R. S. O. ch. 126.

If the question had been between the owner (in this case the mortgagor) and the lienholders different considerations would have arisen, to which the cases cited would have more or less application, but in the view I take it is unnecessary to express any opinion as to whether the decision of the Pennsylvania Courts or those of the Courts of the States of Iowa, Illinois and Mississippi which were cited at the bar are to be preferred.

But for the provisions of sub-section 3 of section 5, the rights of a prior mortgagee would be wholly unaffected.

The lien which the Act gives attaches only upon the estate and interest of the owner, as defined by the Act (which does not include a prior mortgagee), in the building erection or mine upon or in respect of which the work is done or the materials or machinery placed or furnished, and the land occupied thereby or enjoyed therewith: sub-section 1 of section 5.

Sub-section 3 is as follows: In case the land upon or in respect of which any work as aforesaid is executed, or labour performed, or upon which materials or machinery are placed, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the construction, alteration or repairs of the building, or

Judgment.
Meredith,
C.J.

by the erection or placing of the materials or machinery, the lien under this Act shall be entitled to rank upon the increased value in priority to the mortgage or other charge.

It will be observed that although the lien as against the owner binds his estate and interest for the full price of the work or materials the security of the mortgagee is not affected unless the value of the land is increased by the work done or materials supplied by the lienholder, and then only by allowing the lien to rank on the increased value in priority to the mortgage.

The policy of the Act was evidently to take from the mortgagee the benefit which at common law he was entitled to, of the work and materials which after the making of his mortgage had been employed in the improvement of the property and which had not been paid for by the mortgagor, and to leave his security otherwise unimpaired. The lienholder is therefore given a security in priority to the mortgage on the increased value and the mortgagee still retains his priority over the lienholder as to all that his security embraces, except that increased value.

If this be so, it would seem necessarily to follow that any loss or depreciation of that which gives the increased value to the land must fall on the lienholder; the increased value, and that only, is his security as against the mortgagee, and when it is gone it would be unjust to require the mortgagee to make good the loss by impairing or depriving him of his prior security—that was the rule of the civil law, and there is nothing in the language of the Act or the policy of the legislation as indicated by the provisions which it contains, which requires a construction to be placed on sub-section 3 which would work such an injustice. If it be not so cases may, and probably will, arise in which the entire security of the mortgagee will be swept away.

Take as an example such a case as this: A. is a mortgagee of lands for \$2,000, and the lands are ample security for his debt; the mortgagor erects a building which costs

\$4,000, the selling value of the land is thereby increased by that sum and there are liens for the full amount; the building is afterwards destroyed: according to the contention of the appellants the lienholders being entitled to priority to the mortgage for \$4,000, would sweep away the whole of the proceeds which could be realized from a sale of the property.

Judgment.
Meredith,
C.J.

The view taken by the referee ignores the fact that, except as to the right of the lien to rank on the increased value, the mortgagees' rights are not affected, and, as I have already pointed out, as to the whole value, except that increased value, he has priority over the lienholder.

I have a strong opinion, though it is not necessary for the decision of this case to decide, that the question of what is the increased value to which the lienholder is entitled as against the mortgagee to resort for the satisfaction of his lien cannot be finally determined until the lands have been sold, and that it is with reference to the result of the sale and the condition of the property at the time of the sale that the respective rights of the mortgagee and the lienholders are to be finally ascertained. I say finally, because it seems necessary according to the provisions of section 13 of the Act of 1890, 53 Vict. ch. 37 (O.), that the increased value should be ascertained before the sale takes place, but that, I apprehend, is only to enable the mortgagee to pay off the prior charge on the increased value if he desires to do so.

The practice before the passing of the Act was to provide in the judgment for the increased value being ascertained after, unless the mortgagee desired that it should be done before, the sale: see form 25, page 136, Holmsted's Mechanics' Lien Act.

But, however that may be, it is, I think, clear that where, as in this case, it appears during the reference that the building in respect of which the lien exists and which gave the increased value, upon which the lien is entitled to rank in priority to the mortgage, has been destroyed there remains nothing to give the lienholder priority over

Judgment.
Meredith,
C.J.

the mortgagee; that there is no longer any increased value for him to rank upon; and that the mortgagees should be found to be entitled to priority to the lienholder.

I have been unable to find in the legislation of the neighbouring States any provision as to the position of a prior mortgagee exactly similar to that which our Act contains, though in some of them, provisions somewhat similar in principle have been enacted, and the cases decided upon them accord with the views I have expressed: see *Croakey v. North-Western Man. Co.*, 48 Ill. 481; *Grundeis v. Hartwell*, 90 Ill. 324.

I refer also to the case of *Broughton v. Smallpiece*, 7 P. R. 270, *S. C.* 25 Gr. 290, in which the provision of the Act of 1874, for which sub-section 3 was substituted, was under consideration, and the case of *Kennedy v. Haddow*, 19 O. R. 240, in which the Chancellor had to deal with the effect of sub-section 3, in both of which observations as to the scope of these provisions were made, which support the conclusion to which I have come.

The fact that the building was insured by the second mortgagees and that they have received \$6,225 of insurance money does not, I think, help the lienholders. There is nothing in the Act which entitles them to the benefit of the insurance moneys. Putting their case on the highest ground, their position was that of prior incumbrancers to the second mortgagees, and I know of no rule of law which prevents a second mortgagee insuring the building on the mortgaged lands for his own benefit or which entitles a prior mortgagee to any benefit from such an insurance.

In my opinion the appeal ought to be dismissed, and the appellants must pay the costs of it.

ROSE, J. :—

In my opinion the lien attaching upon the increased value of the land does not charge the value prior to the increase, *i.e.*, does not charge the land except as to its increased value. When the land is sold the money realized

from the sale of the increased value is set apart for the purpose of paying the lienholder, the mortgagee retaining his security unaffected by the increase, which in this case has been destroyed. In other words, as against the lienholder the mortgagee cannot claim the increased value as an addition to his security, although of course he may as against the mortgagor. While as against the lienholder the mortgagee's security is not permitted to be increased by the work done by the lienholder, neither is the lienholder permitted to lessen or destroy the mortgage security, and so until the property is sold and the money realized the mortgagee is entitled to his security unaffected and in that sense unimpaired. If a fire occur after report and before sale it would, I think, be a proper case to bring before the Court on petition, when, no doubt, relief would be given.

Judgment.
Rose, J.

I agree that the appeal must be dismissed.

MACMAHON, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

RE ONTARIO FORGE AND BOLT CO.
RE WINDING-UP ACT, R. S. C. CH. 129.

TOWNSEND'S CASE.

Company—Auditor—Right to Rank as "Clerk"—Winding-up Act.

An auditor employed in auditing books of a company does not come within the designation of "clerks and other persons having been in the employment of the company in or about its business or trade" so as to entitle him to the special privilege given by sec. 56 of the Winding-up Act, R. S. C. ch. 129, to be collocated in the dividend sheet for arrears of salary or wages.

Statement. THIS was an appeal from a part of report of J. S. Cartwright, Official Referee herein, disallowing the claimant's claim for salary or wages, as privileged, on the estate of the Ontario Forge and Bolt Company in liquidation. The claimant had been the auditor of the company before its insolvency, and claimed for arrears of salary as a clerk. The claimant appealed, and the appeal was argued before ROBERTSON, J., in Court, on 17th October, A. D. 1895, when judgment was reserved. The facts appear in the judgment.

John Akers, for the appeal.

John Greer, contra.

January 6th, 1896. ROBERTSON, J.:—

The claimant was the auditor of the company. In his evidence before the Official Referee, he says: "I was auditor for the Ontario Forge and Bolt Company. My year of audit expired on the 31st May, 1895. I charged the company \$2 per hour for auditing, but this was put at a fixed sum of \$150 for the first year, and \$195 for the second year, and sometimes more. I do not make as a rule definite charges except with incorporated companies. The directors would fix the sum. I never saw any writing at all from the company making me auditor. Mr. Worthington eight

years ago, or whenever this company started, asked me to go and audit the books. I sent him an account every year ; I think the last two years were at \$200. I did no work between 31st May, 1893, and 17th May, 1894. On the last date I went out and worked until 30th June, only work for year ending 31st May. I made whole days from 9 a.m. to 6 p.m. without break on 17th and 18th May, and June 4th, 5th, 6th, 11th, all day and evening. I cannot say how long, perhaps twelve hours, not taking noon time half-hour for lunch, 18th June, 22nd June, 23rd, 25th, 26th, 27th, 28th, 29th and 30th. I was never at my own office at all on any of those days. I finished work for which I make claim on the last date. I rendered an account for this to the liquidator. I presume I made the report and finished up the private work at my house, though I have no record of it or claim for it. I did not enter on the financial year beginning 1st June, 1894. I think my name is on the minutes, but I am not sure. That is all I have as to my claim for audit fee.

Section 56 of the Winding-up Act R. S. C. ch. 129, declares that " When the business of a company is being wound up, * * 2. Clerks and other persons in or having been in the employment of the company in or about its business or trade; shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order " : 45 Vict. ch. 23, sec. 60, part ; 49 Vict. ch. 46, sec. 1.

The learned Referee considered the matter fully and the authorities cited to him, and he says :—

" The words of the Act are in one sense very wide. I have not been referred to any decision on the Act, but Mr. Greer has referred me to the case of *Welch v. Ellis*, 22 A. R. 255, and the cases cited therein, also to a case of *Bound v. Lawrence*, [1892] 1 Q. B. 226. In the light of those decisions, and bearing in mind that the claimant per-

Judgment. formed services for which he was not in any usual sense paid wages, I am of opinion that he is not entitled to any preference. His services were not performed from day to day, as is the case with 'clerks,' but were all compressed within six or seven weeks in each year. It is, therefore, a mere accident that any services were performed by the claimant within three months of the winding-up order. This fact, I think, taken with the obvious intention of the Act, is sufficient to determine the case. It appears to me that the words 'clerks or other persons in or having been in the employment of the company in or about its business or trade,' were intended to protect persons whose sole, or at least whose chief employment, was with one company and whose principal means of support were derived therefrom. I do not think the words of the Act can be extended to the present case."

The question is whether an auditor comes within the designation of "clerks and other persons in or having been in the employment of the company in or about its business or trade."

I think these last words, "in or about its business or trade," afford a key to what the statute meant. According to "Worcester": "Auditor, a person appointed to examine a particular account, and state or certify the result; or an officer whose business it is to examine and verify all accounts relating to the business of the government, corporation or other authority, from which he receives his appointment." According to Black's Law Dictionary, an "auditor * * in English law, is an officer or agent * * of a private individual, or corporation, who examines periodically the accounts of under officers," etc., "and reports the state of their accounts to his principal." Mr. Anderson in his Dictionary of Law defines "audit" *inter alia* "The act or proceeding of officially examining, and allowing or certifying, or of rejecting, a charge, or account"; and "auditor," he says, "is one who officially examines and allows as proper and lawful, or rejects as unlawful, the items of an account or accounts."

The object, I presume, of having an annual audit of the ^{Judgment} accounts of this company was to exhibit a truthful statement ^{Robertson, J.} of the affairs of the company, as managed by the directors, to the general meeting of the shareholders, for the purpose of satisfying them how their business was being carried on and managed by the directors, and in order to give force and character to their annual statement, for the purpose of declaring dividends, etc., and satisfying the shareholders as to the real state of the affairs of the company, as managed by the directors. It is only reasonable, then, to conclude that the auditor thus employed is a person whose position is an independent one, whose duty it is to discover and point out the errors or mistakes of the directors if any, the gains and losses of the company,—to shew in fact, exactly the true state of the accounts; so that he stands, as it were, between the directors and the shareholders as an independent investigator of all business transactions, in which the directors, as the managers of the affairs of the company, have been engaged for the previous year, or whatever period previously to the audit, he may be called upon to examine the books, vouchers and documents connected with the business; he is not a mere clerk, book-keeper, or accountant in the employment of the company in or about its business or trade; his duty is to examine into all the affairs of the company which have been in any way manipulated or transacted by such persons from day to day, and to report thereon. In my judgment, he does not belong to such class of persons any more than a solicitor would who had been asked to investigate and advise on any contract, or transaction, in which the company had been interested, in carrying on their legitimate business. The auditor cannot be said to be employed by "the company in or about its business or trade." I have no doubt the fact is that Mr. Townsend is engaged in the work of auditing for many companies, or individuals, or corporations; he is to all intents and purposes a professional man, who gives his services from time to time, as they may be required, as any other professional man would when his

Judgment. services are required. We know that there are "chartered accountants" in Ontario, and I would be somewhat surprised if Mr. Townsend is not one of that body. It is also noticeable that the claimant himself does not claim as being entitled to a salary, or wages, in the common acceptance of the term, but it is an "audit fee" that he charges for, and claims for, which to my mind is quite inconsistent with the position of "a clerk or other person," in the employment of the company.

So far as I have been able to ascertain, the question arising on this claim is in a manner unique, the question never having been heretofore brought into Court for decision, so far as I am able to find. I have, therefore, to deal with it on general principles, for the purpose of construing the words of the section under which this claim is made.

I might refer to a case which gives point to the conclusion I have come to: By 4 Geo. IV. ch. 34, sec. 3, it is enacted "that if any servant in husbandry, etc., or other person shall contract with any person or persons whomsoever to serve him," etc.; to be within the Act the party must not only be included in the enumeration of persons to be affected by it, but must also have "contracted to serve." Now there is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them: *per* Bayley, J., in *Hardy v. Ryle*, 9 B. & C. 603, at p. 611.

Now here there was no contract of service, so to speak; the claimant was to audit the company's accounts, there was no contract as to time or wages, the auditor charged "a fee," not a salary—so there was neither salary or wages due or unpaid to him.

In my judgment the learned Referee was right in the conclusion he came to, and his report should be affirmed, and the appeal dismissed; but as the question is new, I do not think I should order the appellant to pay the costs, but the costs of the liquidator, however, should be paid out of the estate.

G. F. H.

[QUEEN'S BENCH DIVISION.]

MILLIGAN V. SUTHERLAND.

*Chattel Mortgage—After Acquired Goods—Description—Schedules—
Change of Place of Business.*

Where persons carrying on business as manufacturers of hoops and staves at their factory at B., and also as general storekeepers at L., in the same county, made a chattel mortgage conveying their goods and chattels to defendant, as set forth in two schedules annexed thereto, schedule A. covering the machinery and other goods and chattels in the factory, and which, after describing them, extended to all other goods and chattels thereafter purchased or manufactured or brought on the premises, whether for the business of stave manufacturing or not, or into or upon any other premises thereafter to be occupied by the mortgagors, or either of them, it being understood that all logs, staves and bolts manufactured and timber brought on the mortgagor's premises or not, after the execution of the mortgage, should be covered thereby; the other schedule B. covering the goods and chattels in the general store, and extending to goods and chattels thereafter brought into the said store premises:—

Held, that the provision in schedule B. as to after acquired goods referred only to goods brought into the store in which the business was then being carried on, and not to goods brought into the store at B., to which that business had been subsequently removed; and that the provision as to after acquired goods in schedule A. did not apply to the after acquired goods brought into the store at B., for the reference thereto was only to goods of the character referred to in that schedule.

THIS was an action tried before ROSE, J., at the non- Statement.
jury Sitings, at St. Thomas, on the 10th April, 1895.

The action was brought by the plaintiff as assignee for creditors of Edgar C. VanSyckle and Neil VanSyckle to recover possession of certain goods and chattels which were taken by the defendants under a chattel mortgage made to them by the VanSyckles.

The decision turned on the description of the goods and chattels contained in the mortgage and schedules, which are set out in the judgment of ARMOUR, C. J.

Before the assignment was made, the defendants had taken actual possession of the goods.

The learned Judge at the trial held that the mortgage covered the goods in question, and that the defendants were entitled to judgment.

The plaintiff moved on notice to set aside the judgment entered for the defendants, and to have it entered in his favour.

Argument.

In Michaelmas Sittings, November 22nd, 1895, before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, J., *Crothers* supported the motion.

Aylesworth, Q. C., contra.

The arguments and cases cited sufficiently appear from the judgments.

January 3, 1896. ARMOUR, C. J. :—

On the 4th day of January, 1894, the date of the chattel mortgage under which the defendants claim, the mortgagors were carrying on the business of manufacturing hoops and staves in the village of Bismark, in the county of Elgin, and were also carrying on a mercantile business in the village of Lawrence Station, in the same county, and by the said chattel mortgage, conveyed to the defendants, "All and singular, the goods and chattels particularly mentioned and set forth in the schedule hereunto annexed and marked A., all of which said goods and chattels are now the property of the mortgagors, and are situate in and upon the premises known as Schleifhauf Bros.' mill, in the village of Bismark, in the county of Elgin, and Province of Ontario, and being composed of lots 177, 178 and 179 of lot 18, in the 8th concession of the township of Aldborough aforesaid. Also all the goods and chattels particularly mentioned and set forth in the schedule hereto annexed and marked B., all of which goods are the property of the mortgagors, and are situate on Main street, in the village of Lawrence Station, township of Southwold, county of Elgin."

The following is a copy of "schedule A. referred to in the annexed chattel mortgage, dated the 4th day of January, A.D. 1894, and made by Edgar C. Vansyckle and Neal W. Vansyckle, to Sutherland, Turner & Co., smoke stacks; 2 boilers, with all connections; 2 engines, with all connections; bolter, with all connections; equalizer, with fittings; stove machine, with connections; steam boxes, with piping and all connections. All belting, shafting,

pullies and buildings, barrows and utensils in and about said mill and mill premises. All the stock in trade, logs and bolts, staves and fixtures, including horses and other chattels of the said mortgagors, which, from time to time, may be purchased or manufactured during the currency of this mortgage, and brought into and upon the premises and the mill of the said mortgagors, whether for the purposes of their business as stave manufacturers or not, or into or upon any other premises hereinafter to be occupied by the said mortgagors or either of them; it being understood and agreed between the parties hereto, and to the said annexed chattel mortgage, that all logs of every kind, and staves and bolts manufactured, and timber bought, and whether brought on the premises of the mortgagors or not after the execution of these presents, shall be covered by the said chattel mortgage as effectually as if the same were now upon the said lands and premises of the mortgagors, being lots 177, 178, 179, of the township lot 18 in the 8th concession of Aldborough, in the county of Elgin, upon which property there is erected a saw and stave mill and bending factory." Judgment.
Armour, C. J.

The following is a copy of "schedule B., referred to in the annexed chattel mortgage, dated the 4th day of January, 1894, and made by Edgar C. Vansyckle and Neal W. Vansyckle to Sutherland, Turner & Co. All the dry goods, boots and shoes, millinery goods, groceries, gentlemen's furnishing goods and stock in trade, now in possession of the mortgagors, and being in the store occupied by the said mortgagors on Main street, at Lawrence Station, in the county of Elgin; also any and all stock or goods and chattels and effects, which should at any time, during the currency of this mortgage, be brought into or upon said premises or store, either in addition to or in substitution for the stock in trade now being therein or any of them."

About the middle of January, 1894, the mortgagors removed their mercantile business to Bismark (West Lorne) to a store on the main street there, a block or more from

Judgment. the mill, and thereafter purchased goods for their mercantile business, and brought them into such store. And the question raised is, whether such last mentioned goods were covered by the chattel mortgage; and, in my opinion, they clearly were not. The schedules, above set out, have relation to two distinct subject matters. Schedule A. to the business of manufacturing hoops and staves; and schedule B. to the mercantile business carried on by the mortgagors.

Armour, C.J.

And the words "other chattels" in schedule A. must be taken to mean other chattels of the same kind as those thereinbefore specifically enumerated, and cannot be held to include the chattels specified in schedule B., which are of a wholly different nature from those specifically enumerated in schedule A., and consequently cannot include the goods purchased by the mortgagors, which were brought into their store at Bismark (West Lorne), after the removal of their mercantile business to that place.

The rule being that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

After acquired property is dealt with in each schedule, but that in schedule B. is confined to that which should be brought into the store occupied by the mortgagors on Main street at Lawrence Station; and the plaintiff is therefore entitled to after acquired property which was not brought into the said store.

The judgment of the learned Judge must, therefore, be varied by adding to the sum of \$206, the amount to which he found the plaintiff entitled, the amount of the value of the after acquired property referred to in schedule B. and not brought into the store occupied by the mortgagors on Main street, at Lawrence Station, to be ascertained by the local registrar at St. Thomas, in case the parties differ as to such amount; and the plaintiff will be entitled to the full costs of the action and motion.

FALCONBRIDGE, J. :—

Judgment.

Falconbridge,
J.

The only question is, whether the plaintiff is entitled to have added to his judgment the value of the goods bought by Vansyckle Bros., after their removal from Lawrence Station to West Lorne, and seized in their general store there, and sold by the defendants; the ground alleged by the plaintiff being that the learned trial Judge erred in holding that the description of goods and chattels set forth in the chattel mortgage and Schedule A. attached thereto, under which the defendants claimed, was sufficient to cover and include the goods so purchased and taken to the general store.

[The learned Judge then set out the descriptions of the goods in the chattel mortgage and schedules "A." and "B.," and proceeded:]

The wording of schedule A. would bring the case clearly within *Horsfall v. Boisseau*, 21 A. R. 663; and, if we could ignore schedule B. or hold that schedule A. had reference to or covered all the goods mortgaged, the description would be sufficient within the meaning of R. S. O. ch. 125, sec. 27 (now 57 Vict. ch. 37, sec. 32 (O.).)

But unfortunately for the defendants, schedule A. is descriptive only of the goods then on the mill premises, and not of the store goods, which are particularly mentioned and set forth in schedule B. the wording of which falls short of what is required; like the words used in *Williams v. Leonard*, 16 P. R. 544; so that "other chattels" must be read as *ejusdem generis* with what precedes them, and mean only mill machinery, mill stock and mill chattels.

The evidence shewed, and the learned Judge found that possession was taken by defendants before the assignment was delivered or even completed; and this, while it does not avail the defendants by reason of the provision in 55 Vict. ch. 26, sec. 4 (O.) (now 57 Vict. ch. 37, sec. 40 (O.)), was relied on by the defendants as completing the identification and curing the vagueness of the description.

Judgment. I do not think we can give effect to this contention.
Falconbridge, J. The judgment must, therefore, be increased by the addition of the value of the after acquired property referred to in schedule B, and not brought into the store occupied by the defendants on Main street, Lawrence Station. Reference to local registrar at St. Thomas, to fix the amount.

The plaintiff to have full costs of the action and motion.

G. F. H.

[QUEEN'S BENCH DIVISION.]

HARPELLE V. CARROLL.

Landlord and Tenant—Distress—Withdrawal—Arrangement with Tenant—Second Distress—Fraud—58 Vict. ch. 26, sec. 4—Construction of.

A landlord may lawfully distress a second time for the same rent when the first distress is withdrawn by an arrangement for the benefit of the tenant and which arrangement is at an end at the time of the second distress.

Semble, when the withdrawal has been effected through the fraud of the tenant the landlord can again distress.

Section 4 of 58 Vict. ch. 26 (O.), the Landlord and Tenant Act, 1895, does not take away the common law right of distress, but merely renders it unnecessary that the relation of landlord and tenant should depend upon tenure or service or that a reversion should be necessary to the relation.

In any event the section is not retrospective.

Statement. THIS was an action tried before MEREDITH, C. J., at Kingston without a jury, on the 2nd and 4th November, 1895.

The action was for an alleged unlawful interference by defendant with a distress for rent levied by the plaintiff on the goods and chattels of one E. L. Christopher, his tenant.

The plaintiff was the lessor under a lease, dated 6th January, 1894, whereby he leased to E. L. Christopher a farm in the township of Kingston, in the county of Frontenac, for five years, at the yearly rent of \$125, payable on the 1st of March in each year.

The lease, made in pursuance of the Act respecting short Statement. forms of leases, was the usual form of farm lease, and did not contain any express provision for distress, but contained an acceleration clause providing, among other things, that if the lessee should make any chattel mortgage of his crops or other goods and chattels the then current and next ensuing one year's rent and the taxes for the then current year should immediately become due and payable, and the term thereby granted should immediately become forfeited and void.

On the 11th March, 1895, the two preceding years' rent being then due and in arrear, the plaintiff distrained therefor. Subsequently, on the 22nd of the same month, the plaintiff withdrew the distress. This was done at the request and for the accommodation of Christopher, the tenant, and on he and his wife giving the plaintiff a chattel mortgage on all his goods and chattels to secure the overdue rent, which, by the terms of the mortgage, was payable on the 1st October following.

Christopher had, on the 29th October, 1894, given a chattel mortgage on his goods to the defendant to secure the sum of \$146, but had never notified the plaintiff of his having given this mortgage, and the plaintiff was not aware of it until the 30th of September following, whereupon he made a second distress.

The mortgage given to the plaintiff contained a provision that in case the mortgagee should feel unsafe or insecure, or deem the said goods and chattels in danger of being sold or removed, then the whole of the moneys secured by the mortgage should immediately become due and payable, and it should be lawful for the mortgagee to enter and take possession and remove the goods and chattels, and to sell the same.

On the 30th September, 1895, the mortgage money being still unpaid and plaintiff having discovered the fact of the existence of the mortgage to the defendant, and believing that he was unsafe and insecure, and that there was danger of the goods and chattels being removed and sold,

Statement. issued a warrant to his bailiff to distrain for the arrears of rent then due, and for a third year's rent alleged to be due by virtue of the acceleration clause in the lease.

After the plaintiff had made his distress the defendant, claiming under his chattel mortgage, entered and took away certain of the goods and chattels, and this action was brought to recover damages therefor, and for an assault.

Machar, for the plaintiff.

D. Smythz, Q. C., and *Deroche*, Q. C., for the defendant.

The defendant objected to the plaintiff's recovery on the grounds: 1st, That there having been an abandonment of the first distress the plaintiff could not distrain a second time for the same rent; 2nd, That under the Act 58 Vict. ch. 26, sec. 4 (O.), there was no right of distress at all, there being no contract or provision therefor in the lease; and 3rd, That the Act applied so as to deprive the landlord of the right of distress even where the relation of landlord and tenant was created before the Act came into force.

The learned Judge found the issues of fact in favour of the plaintiff, excepting as to the right of distress for the third year's rent, and reserved his decision on the legal objections raised, and subsequently delivered the following judgment:—

January 3rd, 1896. MEREDITH, C. J.:—

At the close of the argument, I disposed of all of the issues of fact and reserved for further consideration two questions of law which were argued.

These questions were, 1st. As to the right of the plaintiff to distrain apart from the provisions of the statute 58 Vict. ch. 26, sec. 4 (O.); and 2nd. As to the effect of the section referred to, the contention of the defendant being that it is to take away the right of a landlord to distrain even where, as in this case, the relation of landlord and tenant was created before the Act came into force.

As to the first point, the facts were that the plaintiff on the 11th March, 1895, made a distress for two of the three years' rent, in respect of which the distress in question was made. That distress was not proceeded with in consequence of the plaintiff having on the 22nd of the same month, at the request and for the accommodation of the tenant, withdrawn it on obtaining from the tenant and his wife a chattel mortgage on his goods and chattels, securing the payment of the rent which, by the terms of the mortgage, was made payable on the first day of the following October. The mortgage, however, contained a provision that in case the mortgagee should feel unsafe or insecure, or deem the goods and chattels conveyed by the mortgage in danger of being sold or removed, then, and in every such case, the whole of the money secured by the mortgage, should immediately thereon become due and payable.

Judgment.
Meredith,
C.J.

The mortgage money being unpaid, and the plaintiff having come to the conclusion that he was unsafe or insecure, and that there was danger of the goods and chattels being sold or removed, issued a warrant to his bailiff to distrain for the arrears of rent secured by the mortgage, and a third year's rent which he claimed to be due to him under the terms of the lease in consequence of the defendant having seized the goods under a chattel mortgage held by him; and the second distress was made on the 30th September, 1895, under this warrant.

I found also, as a fact, that in obtaining this indulgence from the plaintiff, the tenant fraudulently concealed from him that he and his wife had previously given to the defendant a chattel mortgage on most of the property covered by the plaintiff's mortgage for securing \$146 and interest, and which was the mortgage under which the defendant took and sold the goods upon which the distress was made, and fraudulently represented to the plaintiff that the only chattel mortgage affecting the property was one which had been given by him and his wife to one Dougherty.

Judgment.
Meredith,
C.J.

It was contended on this branch of the case, that the plaintiff had voluntarily abandoned his first distress, and that the second distress was therefore illegal, and that, at all events, the right to distrain was suspended until the 1st October, 1895; and that the second distress having been made before that day, was unlawful.

There was, in my opinion, no such abandonment of the first as prevented the plaintiff from making the second distress after the time for which payment of the rent had been extended had expired. The abandonment to have the effect contended for, must have been a voluntary one; and the cases shew that where the landlord withdraws the distress at the request of the tenant and for his accommodation, it is not a voluntary abandonment, and he is not precluded from making a second distress for the same rent: *Wollaston v. Stafford*, 15 C. B. 278; and that where the first distress is withdrawn, pursuant to an arrangement with the tenant, which the latter fails to observe, a second distress may be made: *Thwaites v. Wilding*, 12 Q. B. D. 4.

The second distress may also, I think, be supported upon the ground that the plaintiff was induced to withdraw the first in consequence of the fraud of the tenant, to which I have referred: *Wollaston v. Stafford*, *supra*.

The other objection on this branch of the case, fails also. It is true that according to the terms of the proviso for redemption of the chattel mortgage, the rent was not to become payable until the 1st October, but by force of the provision, to which I have referred, for accelerating payment, when the plaintiff came, as he did, on the 28th September, to the conclusion that he was unsafe or insecure, and that the goods were in danger of being sold or removed, the mortgage moneys immediately became payable, and the plaintiff was therefore entitled to distrain when he did so on the 30th September.

Then as to the effect of the recent statute.

The section (58 Vict. ch. 26, sec. 4), reads as follows:—

“4. The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the

parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent. And nothing in this Act shall affect any pending litigation."

Judgment.
Meredith,
C.J.

The contention of the defendant is, that the provisions of this section are retrospective, and that the effect of them is, save as to cases pending when the Act was passed, to take away the right of the landlord to distrain except where the agreement by which the relation of landlord and tenant is created confers that right, and that in such cases the right to distrain being a mere license, does not justify the distraining property belonging to a stranger.

In support of this contention, counsel for the defendant adopted and relied on the arguments of the writer of two able articles on the subject in the *Canadian Law Times*, vol. 15, pp. 217-8, and pp. 245, *et seq.*, maintaining that view.

Briefly summarized, the argument is this: The relation of landlord and tenant was, before the passing of the Act, feudal in its nature, and rested upon the fact that the tenant held the land of or from his landlord; the right of distress is incident to the reversion, and no tenure now exists between the parties as between the reversioner and tenant, but the relation of landlord and tenant is one simply of contract, the right of distress, therefore, falls with that to which it was incident—the reversion, and the right to distrain must arise, if at all, from the terms of the contract.

Apart from a consideration of the effect of the section if it stood by itself, there is, I think, in the other provisions of the Act of which it forms part, evidence that the Legislature did not intend to make so radical a change in the law as was contended for, for by the fourth sub-section of section 3 it is provided that in case of an assignment for the benefit of creditors the preferential lien of the landlord (which is the expression used in the Assignment Act

Judgment. and other cognate statutes to describe the landlord's common law right to distrain) is restricted to certain of the arrears and to the period for which the assignee continues to hold possession.

Meredith, C.J.

If section 4 had been intended to take away the common law right of distress, such a provision as this would, as it seems to me, have been unnecessary, and its presence there is consistent only, in my view, with the intention being not to take away that right, but that it was being retained.

The section is, with the exception of its saving clause, substantially in the same words as section 3 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, 23 & 24 Vict. ch. 144.

It is highly probable that if the framer of the Ontario Act, had had before him the caustic criticism which the Irish Act as a whole, and its several parts, including section 3,—as would appear from the reports of the cases to which I shall afterwards refer,—received from the Judges of the Courts of that country during the short time the Act was in force there, he would have chosen different language to express the idea which he probably had, that of doing away with the necessity of the having of the immediate reversion to entitle to distrain one who had let lands to another.

The right of the plaintiff to distrain may also, I think, be supported upon the ground that the provisions of section 4 are not retrospective in the sense of their applying to tenancies existing at the time the Act was passed, and for this proposition *Chute v. Busteed*, 16 Ir. C. L. R. (1865) 222, is, I think, a sufficient authority. In that case the effect of the Irish Act was the subject under consideration; and the Court held, overruling the decision of a majority of the Court of Exchequer, Pigot, C. B., dissenting (*Chute v. Busteed*, 14 Ir. C. L. R. 115), that it was not retrospective.

The question there arose upon section 12, which provided in effect that a landlord of any lands held under any lease or contract of tenancy should have the same action and remedy against the tenant and assignee of the estate or

interest, their heirs, executors or administrators, in respect of the agreements contained or implied in the lease or contract as the original landlord might have had against the original tenant or his heirs or personal representative.

Judgment.
Meredith,
C.J.

Mr. Justice (afterwards Lord) O'Hagan, points out (p. 230), that for the purpose of maintaining the case of the plaintiff, it was necessary to hold that section 3 was retrospective; and he came to the conclusion that it was not so. He says (p. 234): "It seems to me that the words of the section," (3) "naturally point to the future and not to the past. The words 'shall be deemed' are at least capable of being applied in either way, and such words have been expressly held not to be sufficient to compel a retrospective construction: *Hitchcock v. Way*, 6 A. & E. 943; *Thompson v. Lack*, 3 C. B. 540. And it is enough for the argument I am adopting, if the phrase be ambiguous; and afford us, therefore, the opportunity of construing in accordance with justice and the reason of the thing. Again, the words 'and a reversion shall not be necessary to such relation' taken in connection with those which follow 'in all cases and in which there shall be an agreement,' seem to me more prospective than retrospective in their scope and import; and at the lowest are not retrospective so clearly and unambiguously as to coerce us to give them all *ex post facto* operation."

Chief Baron Pigot had taken in the Court below the same view as to the scope and effect of section 3.

See also *M'Areavy v. Hannan*, 13 Ir. C. L. R. (1861) 70.

But even if section 4 of the Ontario Act apply to existing leases, I do not think that it has the effect of taking away the common law right of distress of the landlord.

That right appears to have been borrowed from the civil law, and was the remedy which was given to the lord for the recovery of the rent or service which his tenant had obliged himself by his feudal contract to render to him in lieu of the right which the lord had, under the feudal system, of resuming his feud for non-performance of those services; and in this sense his right of distress had a

Judgment. feudal origin, which the terms "landlord" and "tenant" betoken. That which the tenant was obliged to render was designated rent service, and rent service could be rendered only to the lord of whom the lands were holden. After the passing of the statute *Quia Emptores*, and the consequent abolition of subinfeudation, a reversion in the landlord was necessary to create the relation of landlord and tenant, and to make the rent payable by the tenant rent service, to which the right of distress was incident. After the passing of that Act, if one made a lease for life or gift in tail, saving the reversion to himself, with a reservation of rent or other service, that was a rent service for which the donor or lessor had a remedy by distress as before the statute, "for neither the lessee nor donee was *feoffatus* within that Act; because there is a reversion in the donor sufficient to support the tenure of him": Gilbert on Rents, p. 15. But "in the case of a feoffment in fee, or a lease for life, the remainder in fee, if the feoffor reserves a rent, such rent is rent seck, because it is unprofitable to the feoffee, he having no remedy for the recovery of it, the reason whereof is, because the land out of which the rent is reserved, is not held of the feoffor, and consequently the feoffee is not obliged to take the oath of fealty to him for lands which are held of another, and where there was no fealty due, there could be no seizure, by the old law, for non-performance of the service, and consequently no distress without a particular provision of the parties": *ibid.* pp. 15, 16.

Meredith,
C.J.

It would seem to follow, therefore, that the relation of landlord and tenant, properly so called, was not created unless the lessor retained to himself the reversion, but that it was created whenever the rent was reserved by a lessor having the reversion; and the result of this would appear to be, that whenever the relation of landlord and tenant was created, it drew with it the right to distrain for the rent reserved by the lessor; and, as put in Woodfall on Landlord and Tenant, 15th ed., 440: "Distress is incident of common right to every *rent service*, properly so called, and the rent

due from a tenant to a landlord, is properly called a 'rent service,' though this description of it has long passed out of common use."

Judgment.

Meredith,
C.J.

Now the section in question does not abolish the relation of landlord and tenant, and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long existing and well-known relation; it is hereafter not to be a matter depending on tenure or service, as it was under the feudal law, nor is a reversion to be necessary to the relation, as it was after the statute *Quia Emptores*, but it is to be deemed to be founded on contract express or implied. It was always, I take it, necessary that in a certain sense the relation should be founded on contract, because there must have been an agreement express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter the latter requisite, and to create the relation whenever, as it provides, there shall be an agreement to hold land from or under another "in consideration of any rent."

It will be also observed that the section does not in terms, or I think by necessary implication, assume to interfere with cases where, as in this, the true relation of landlord and tenant exists. I mean by that where the lands are held in consideration of a rent of one who had the immediate reversion in them, or the rights incident to that relation; but, as I have endeavoured to point out, does away with the necessity of the person to whom the rent is reserved, having the immediate reversion in the lands in respect of which it is payable, in order to the creation of that relation.

The right is, I think, not interfered with for another reason. Such an agreement as the statute mentions, if there were no reversion in the lessor, made the rent

Judgment. reserved, I take it, rent seck; and, though there was at
Meredith, common law no right of distress for that species of rent,
C.J. the right was given by 4 Geo. II., ch. 28, sec. 5, which provides that there shall be the like remedy to recover rent-seck as exists in case of rent service reserved on a lease to a reversioner.

I am inclined to think that it will be found that the section, instead of curtailing, has enlarged the right of distress by extending it to all cases in which there is an agreement of the nature mentioned in it; but, however that may be, I ought not, I think, without a much clearer expression of the will of the Legislature, to give to its enactment such a construction as would practically sweep away the whole body of the law (common and statute) affecting the relation of landlord and tenant, and the rights, interests and obligations arising out of that relation, without substituting for it anything but the bald provisions of this section—an objection to which the Irish Act was not open as it did, as some of the Judges thought, provide a new code of law dealing with those matters.

Upon the whole, I think the plaintiff is entitled to recover.

[The learned Chief Justice then assessed the damages.]

G. F. H.

[QUEEN'S BENCH DIVISION.]

McKAY

v.

THE NORWICH UNION INSURANCE COMPANY.

Fire Insurance—Statutory Conditions—Variation—Unreasonableness—Notice—Vacancy—Materiality—Part Affected—Title—Agreement between Mortgagee and Insurance Company—Subrogation.

The defendants insured seven houses belonging to the plaintiff and which had been mortgaged by him to a loan company and which were described in the policy as "a two story frame, roughcast, felt-roofed block, * * containing seven dwellings, six of which are occupied by tenants, and one by assured." In the application, filled up by defendants' agent, the question, as to how many tenants, was answered "six tenants and applicant," the agent informing defendants that "the largest house of the lot the applicant will occupy himself." A variation of the statutory conditions was printed on the policy in these words: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied, * * this policy shall cease and be void unless the company shall by endorsement * * allow the insurance to be continued." A fire occurred by which the houses were destroyed, and defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to which they claimed to have a defence against the mortgagor, to be subrogated to the loan company's rights and to have the mortgage assigned to them. For some months prior to the fire several of the houses became and remained vacant, of which the plaintiff was aware, but of which he did not notify defendants.

In an action by plaintiff upon the policy :—

Held, that the actual facts as to occupancy being before them at the time of the application, the defendants were liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant or unoccupied houses :—

Held, also, that the variation as to the premises becoming vacant or unoccupied where, as here, the houses were of a class likely to be occupied by tenants for short periods was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued.

Smith v. The City of London Ins. Co., 14 A. R. 328, and *Ballagh v. The Royal Mutual Fire Ins. Co.*, 5 A. R. 87, specially referred to :—

Held, however, that the fact that several of the houses were vacant to plaintiff's knowledge for some months before the fire, was, under the third statutory condition, a change material to the risk, which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected," which in this case was the whole block :—

Held, also, that the meaning of the word "risk" in the third statutory condition is not distinguishable from the same word in the first statutory condition, and that subsequent mortgages executed by plaintiff were matters relating to title, and were not covered.

Reddick v. The Saugeen Mutual Fire Ins. Co., 14 O. R. 506, followed :—
Held, lastly, that although defendants had paid the mortgagees and taken
an assignment of the mortgage, they could not hold it against the
plaintiff.

Imperial Fire Ins. Co. v. Bull, 18 S. C. R. 697, followed.
Judgment of FALCONBRIDGE, J., affirmed.

Statement. THIS was an appeal and cross-appeal from a judgment of
FALCONBRIDGE, J.

The following facts are taken from the judgment of
STREET, J., in the Divisional Court :—

Action upon a policy of insurance against fire dated 2nd
May, 1892, for three years, upon a block of seven houses,
for \$2,500, alleging that they had been destroyed by fire
on the 15th August, 1894, and that the plaintiff had suffered
damage to the full amount of the policy.

The plaintiff further set forth that shortly before the
insurance was effected he mortgaged the property to the
Canada Permanent Loan and Savings Company for \$1,400,
with a covenant to insure, and that the defendants delivered
the policy in question to the mortgagees with a provision
inserted in it making the loss, if any, payable to them.

That by an agreement between the mortgagees and the
defendants it was agreed that in the event of the defendants
paying the mortgagees the insurance moneys to the
amount of their mortgage, the mortgagees would assign
the mortgage to the defendants with all the rights the
mortgagees enjoyed against the plaintiff prior to the deli-
very of the policy ; that the defendants, upon the happen-
ing of the loss, paid to the mortgagees the amount of their
mortgage, and took an assignment of it, and claimed to
hold it against the plaintiff, and refused to pay the balance
of the insurance money.

The plaintiff asked that the defendants might be ordered
to pay the whole amount of the policy, or in the alterna-
tive, that they might be ordered to pay the amount of the
difference between the amount of the policy and the mort-
gage money which they had paid, and to release the
mortgage.

The defendants pleaded (1) that the plaintiff represented

to them when applying for the insurance that six of the buildings insured were then occupied by tenants, and one of the buildings by himself; that this was a material statement and was untrue, and that the insurance was of no force; (2) that after effecting the insurance the plaintiff made two further mortgages upon the property without notice to the defendants; that this was a change material to the risk, and avoided the policy; (3) that the premises became vacant and unoccupied prior to the fire, and so remained down to the time of the fire, and that by a variation to the statutory conditions properly printed on the policy, such vacancy and non-occupation rendered it void; (4) that such vacancy and non-occupation was a change material to the risk, and no notice thereof was given to the company, and that the policy thereby became void.

The defendants also, by counterclaim, claimed against the plaintiffs judgment for the amount of the mortgage from him to the Canada Permanent Loan and Savings Company which they claimed as such assignees.

The action was tried on 11th April, 1895, at the Toronto Spring Assizes, before FALCONBRIDGE, J., without a jury.

Elgin Myers, Q. C., for the plaintiff.

Wallace Nesbitt, for the defendants.

It appeared that at the time the insurance was effected six of the houses were occupied by tenants; the seventh house was unoccupied, except that the plaintiff had some tools in it; at the time of the fire only three of the houses were occupied; the remaining four were vacant, and had been so for several months. The plaintiff never occupied the seventh house, nor had it been occupied at all for two or three months before the fire, excepting that a man named Phillips had left a few articles of furniture in it; it had been entirely vacant for several weeks after the application for insurance, save for the plaintiff's tools; the fire which destroyed the buildings started between two and

Statement. three o'clock in the morning, in the vacant seventh house, and destroyed the whole block.

The application for the insurance contained certain printed questions with answers opposite them in writing. Under the head "occupancy" the question "state fully entire occupancy, and for what purpose it is occupied," was answered "seven dwellings": and the question "how many tenants and what business are they engaged in," was answered "six tenants and applicant." A memorandum underneath these statements and over the plaintiff's signature made these and the other statements in the application the basis of the defendants' contract, and a special warranty as if written on the face of the policy.

The application was put in by the plaintiff's counsel; attached to it was a letter from the local agent of the company in which he forwarded the application to the company, saying among other things, "the largest house of the lot the applicant will occupy himself." A diagram was endorsed on the application shewing one of the end houses of the block to be larger than any of the others. The statutory conditions were printed upon the face of the policy, and certain variations in red ink, one of which was as follows: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises insured shall become vacant or unoccupied, * * this policy shall cease and be void unless the company shall by endorsement on the policy allow the insurance to be continued."

The insured premises are described in the policy as "a two-story frame, roughcast, felt-roofed block, 128 x 28 feet, containing seven dwellings, six of which are occupied by tenants, and one by assured * * (an equal amount on each house)." The total amount of the policy was \$2,500, and there was a provision making the loss, if any, payable to the Canada Permanent Loan and Savings Company.

An agreement between the loan company and the

defendants, dated 30th May, 1890, was put in, by which it was provided that all policies of insurance which should be issued by the defendants insuring their interest in any property, or in which the loss, if any, should be made payable to the loan company, should, as between the loan company and the defendants, be treated as unconditional (saving certain stipulations not affecting the present case), to the extent necessary for the protection of the loan company's interest in the property : but that if the defendants, by reason of such agreement, should pay any loss as to which they should claim they had a defence against the mortgagor, they should be entitled to be subrogated to the rights of the loan company; and upon payment to the loan company, under the policy or otherwise, of the amount of the mortgage money, to have the mortgage assigned to them. Statement.

It was further provided that the waiver by the defendants, by the agreement of the conditions of the policy, should only be operative in so far as the interests of the loan company should require, and should not apply to the mortgagor.

The evidence shewed that the defendants, after the happening of the loss by fire, received from the plaintiff a claim for the amount of the policy in the usual form, and that they afterwards paid to the Canada Permanent Loan and Savings Company the amount of their mortgage money and interest and took an assignment of the mortgage. The mortgage from the plaintiff to the loan company contained a covenant in the usual statutory form that the mortgagor would insure for \$1,800.

It was also shewn on the part of the defendants that on 24th July, 1894, the plaintiff had executed a second mortgage on the property for \$265 to one Carter, and that on 30th October, 1894, he had executed a third mortgage to Messrs. Willis & Brush for \$800, and that no notice had been given to the defendants of either of these encumbrances, nor were they aware of their existence until after the happening of the fire.

Judgment. On 27th May, 1895, the following judgment was
Falconbridge, delivered by FALCONBRIDGE, J.:—
J.

There was no dispute about the facts on one side or the other. The condition of affairs at the time of the application and of the fire was shewn by the evidence of plaintiff's witnesses, and the materiality of the matters set up by way of defence, and the practice of the companies appeared uncontradicted in the testimony adduced by defendants.

The defences as to non-occupancy and non-disclosure of incumbrances are established and are an answer to the action on the policy.

The plaintiff is, under *Bull v. Imperial Fire Ins. Co.*, 18 S. C. R. 697, entitled to a discharge of the mortgage to the Canada Permanent Loan and Savings Company.

No costs.

During the next Michaelmas Sittings of the Divisional Court the plaintiff moved for an order reversing this judgment and directing that judgment be entered for the plaintiff for the full amount of his claim or for a new trial, upon the ground of surprise at the trial, on the evidence that the granting of the subsequent mortgages and the vacating of the premises were not material to the risk, and on the ground that the learned Judge erred in finding that such circumstances were material to the risk, and on the ground that the defendants were estopped from relying on their defences by reason of their having paid the loan company and taken an assignment of their mortgage.

The defendants also moved against that portion of the judgment which directed that they should discharge the mortgage held by them upon the property; and they asked that judgment should be entered in their favour against the plaintiff for the amount of their mortgage as asked by their counter-claim.

The motions were argued together on 29th November, 1895, before the Divisional Court (ARMOUR, C.J., and STREET, J.).

Elgin Myers, Q.C., and *W. J. Clark*, for the plaintiff. Argument.

The evidence shews the insured property consisted of seven small tenement houses all under one roof with one floor all the way through and one common yard but no connecting doors. Although the policy says "an equal amount on each house," there was but one premium and one insurance, not seven, and these words were only to apply in case of loss on separate houses. The defendants' variation from the statutory condition was never seen by the plaintiff and could not have been complied with, and was, therefore, unreasonable. Even if it was reasonable there was notice to the defendants as the agent of the mortgagees, who was collecting the rents and knew of all the vacancies, was the agent of the defendants. They knew of the vacancies without objecting and there was a waiver by sending proofs of loss to the plaintiff, accepting same and payment to the mortgagees. They accepted the premiums and it is too late now to object. They accepted the risk knowing of one vacancy at the time and others subsequently happening should not invalidate the policy. The defendants by taking an assignment of the mortgage and the policy ostensibly as a purchase are scheming to override a decision of the Supreme Court, *Imperial Fire Ins. Co. v. Bull*, 18 S. C. R. 697, by taking an assignment of the policy instead of the mortgage. Tenement houses presuppose a certain amount of vacancies and proof should be made that vacancy was the cause of the fire. We refer to *Cockburn v. The British America Assce. Co.*, 19 O. R. 245; *The Guardian Assce. Co. v. Connolly*, 20 S. C. R. 208; *In re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485; *Quinlan v. The Union Fire Ins. Co.*, 8 A. R. 376; *Graham v. The Ontario Mutual Ins. Co.*, 14 O. R. 358; *Sands v. The Standard Ins. Co.*, 27 Gr. 167; *Strunk v. Fireman's Ins. Co.*, 23 Ins. L. J. 475; *Worley v. State Ins. Co.*, *ib.* 580; *Traders Ins. Co. v. Race*, 21 Ins. L. J. 363; *Burlington Ins. Co. v. Brockway*, 21 Ins. L. J. 624; *The Canada Landed Credit Co. v. The Canada Agricultural Ins. Co.*, 17 Gr. 418; *Lambert v. Connecti-*

Argument. *out Fire Ins. Co.*, 39 Minn. 129; *Mechanics Ins. Co. of Philadelphia v. Hodge*, 46 Ill. (App. Ct.) 479, 149 Ill. 298, 37 N. E. Rep. 51; *The Aurora Fire and Marine Ins. Co. v. Kranick*, 36 Mich. 289; *Hotchkiss v. The Phoenix Ins. Co.*, 76 Wis. 269; Beach on Insurance, secs. 737, 739.

Wallace Nesbitt, and *R. McKay*, for the defendants. A condition as to vacancy is a reasonable alteration of the statutory conditions as was held in *Peck v. The Agricultural Ins. Co.*, 19 O. R. 494. The fire occurred in a vacant house so the condition is most material. The evidence shews the plaintiff mortgaged the property on two subsequent occasions without any notice to the defendants and that the agent who collected the rents was an agent of the defendants only for the purpose of collecting premiums. The sending proofs of loss to the mortgagees was a statutory duty. The case of *Imperial Fire Ins. Co. v. Bull*, does not apply to this case. In that case the defendants having paid the loss to the loan company without disputing their liability were seeking to set up the subrogation clause as an answer to the plaintiff's claim as against themselves and the loan company to have the mortgage discharged, etc. Here the defendants have not paid the loss upon the policy, have always disputed liability and have merely bought the mortgage of the loan company and taken an assignment of it and of the insurance policy. We refer to *Bishop v. Norwich Union Fire Ins. Co.*, 25 Nova Scotia L. R. 492; *Dunlop v. Osborne and Hibbert, etc., Ins. Co.*, 22 A. R. 364; *The Gore District Mutual Fire Ins. Co. v. Samo*, 2 S. C. R. 411; *Harris v. The Waterloo Mutual Fire Ins. Co.*, 10 O. R. 718; *Russ v. The Mutual Fire Ins. Co. of Clinton*, 29 U. C. R. 73.

Myers, Q.C., in reply. In *Harris v. The Waterloo Mutual Fire Ins. Co.*, 10 O. R. 718, there was fraud.

December 31, 1895. The judgment of the Court was delivered by STREET, J.:—

The judgment appealed from has determined that the defendants are not liable for the loss beyond the amount

paid by them to the loan company, and it proceeds upon two grounds: the first being that the policy was avoided by the fact of the premises becoming vacant: and the second that it was avoided by reason of the creation of the subsequent mortgages by the plaintiff upon it. These two grounds must be separately examined.

Judgment.

Street, J.

In the answers to the questions in the formal application for the insurance there is a statement which is not true, because the applicant states that the seven dwellings in the block are occupied by six tenants and the applicant; and the policy follows this statement in describing the premises in the policy. It appears, however, that along with the application the agent by whom the policy was filled up, and who in fact appears to have signed it for the applicant, wrote a letter to the defendants, which is produced, firmly attached to the application, in which he states that "the largest house of the lot the applicant will occupy himself." The application itself is in the handwriting of the agent, and the plaintiff's evidence is that at the time the application was made his intention was to move into this house, and that in the meantime he kept his tools in it, was working about it and was in it every day, and that the agent was aware of all these facts because he told him of them at the time he made the application.

Having before them, when considering the application of the plaintiff, both the formal application and their agent's written qualification of it, the defendants cannot put on one side the agent's letter and say that they wholly relied upon the formal application: they must, I think, be taken to have issued the policy with notice that one of the houses was not yet actually occupied by the plaintiff, but that he intended to occupy it. The effect of the description of the property in the policy must, however, be considered: it is described as "seven dwellings, six of which are occupied by tenants and one by assured."

As a matter of fact it appears that the plaintiff never saw the policy until long after the fire, for it was handed direct from the defendants to the loan company, who

Judgment. thenceforward held it : but the plaintiff is not in a position
Street, J. to say, or, at all events, he has not said, that his case is to
be looked at in any different light than if he had seen the
policy. If he had seen the policy with this description in
it, he would be entitled to read it, in connection with what
he had told the agent, and with the second variation of
the statutory conditions which reads as follows :—" This
policy will not cover vacant or unoccupied buildings (un-
less insured as such), and if the premises insured shall
become vacant or unoccupied * * this policy shall
cease and be void unless the company shall, by endorse-
ment on the policy, allow the insurance to be continued."

With all these matters before him he would be justified
in coming to the conclusion that the statement in the
policy, that one of the buildings was occupied by him must
refer to the constructive occupation by him of which the
agent was aware. He must either have adopted this con-
clusion or another much less charitable to the defendants,
viz., that knowing he was not in occupation they had
described him as being in occupation and had stipulated
in their variation, number two, that, although taking his
premium, they would not pay him for a loss because he
was out of occupation.

I think, therefore, that the defendants cannot be allow-
ed to escape from liability upon the ground that the
actual facts existing at the time of the application were
not before them nor by their statement in the second
variation of the statutory conditions that the policy would
not cover vacant or unoccupied houses.

The next ground of defence to be considered is the
effect of the variation in the statutory conditions which
provides that if the premises insured shall become vacant
or unoccupied "the policy shall cease and be void unless
the company shall by endorsement on the policy allow the
insurance to be continued."

This is apparently intended as a variation of or addi-
tion to the third statutory condition which provides that
"any change material to the risk, and within the control

or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force."

Judgment.

Street, J.

By section 115 of the Insurance Act ch. 167 R. S. O., "variations * * are * * in force only so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

After some difference of opinion it appears to be now settled that the reasonableness of a variation from the statutory conditions is to be tested with relation to the circumstances of each case at the time the policy is issued and not in the light of those existing at the time at which the condition is sought to be applied: *Smith v. The City of London Ins. Co.*, 14 A. R. 328; *Ballagh v. The Royal Mutual Fire Ins. Co.*, 5 A. R. 87.

That the standard to be applied is that furnished by the statutory conditions, so that variations making the conditions of the policy more onerous than the statutory conditions would have done, should be treated as *prima facie*, unreasonable is maintained by our Court of Appeal in the cases referred to in *Smith v. City of London Ins. Co.*, 14 A. R. 328, at p. 337, but controverted by Gwynne, J., in his judgment in the same case, 15 S. C. R. 69, at pp. 78, *et seq.*

Whether that standard should be applied or not in the present case is a question which does not, I think, necessarily arise. The premises insured were seven dwelling houses of a class likely to be occupied by monthly tenants, or by tenants for short periods. Under the terms of the condition sought to be exacted the result of the moving

Judgment.
Street, J.

out of one of these tenants, and of his thereby leaving the tenement he occupied vacant for a single day, whether he knew of the fact or not, would probably be to avoid the policy at once, so far as that particular tenement were concerned, and under some circumstances to avoid it *in toto*, unless the forfeiture should be provided against in advance, or should be subsequently waived by endorsement on the policy.

It appears to me that a condition requiring such incessant vigilance on the part of the insured in order to maintain his policy in force has only to be stated, and its unreasonableness is at once apparent. An unreasonable condition is one which no sensible man would propose; expecting another sensible man to accept it: and no sensible man living thirty or forty miles from Toronto would deem his block of seven small holdings satisfactorily insured if he were told that if one of his tenants should leave and the tenement should become vacant for a day, whether he knew of the fact or not, the policy would be void: that he might, perhaps, persuade the company, applying at their head office in Toronto for the purpose, to endorse a reinstatement of it, would not by any means deprive his position of its hardships. In my opinion the variation without applying the standard to be found in the statutory conditions is not just or reasonable and should not be permitted to prevail.

If we compare it, however, with the statutory condition of which it is to be treated as a variation, the same conclusion is quite as readily arrived at. The insured is bound promptly to notify the company, or its local agent, of the change material to the risk, only when it is within his control or knowledge, upon pain of the avoidance of the policy; if he performs this duty his policy is saved until the company return him the unearned premium and cancel it. Under this condition the insured can save his policy by a letter to the company or the local agent when he acquires knowledge of the vacancy occurring: under the variation, whether he know of the vacancy or not, the

policy becomes void and requires to be revived by an act of the company before it is again of any force: the variation is, therefore, manifestly much more onerous than the statutory condition.

Judgment.

Street, J.

In *Peck v. The Agricultural Ins. Co.*, 19 O. R. 494, a variation from the statutory conditions making a policy void in case the building insured should become vacant and unoccupied and should so remain for ten days, unless the consent of the company in writing should be obtained, was upheld. It does not appear that it was attacked as unreasonable upon any ground except that the fact of a dwelling house becoming vacant was not a circumstance increasing the risk. In that case, too, the policy covered a single dwelling house, occupied by the applicant's son, and ten days were given in which to communicate the fact of its becoming vacant to the company.

In my opinion, however, the defendants are not driven to rely upon the variation to the statutory condition, in order to make out a defence as against the plaintiff. If we could hold that although the second variation above referred to is not binding upon the plaintiff, he can still take advantage of its presence in the policy, as qualifying in favour of the plaintiff the third statutory condition, I should come, I think, to another conclusion. It appears to me, however, that when we have decided that an attempted variation of the statutory conditions is not binding for any reason, we must then read the other conditions as if the attempted variation were not found in the policy for any purpose. This seems to result from the judgment of the Privy Council in *The Citizens Ins. Co. v. Parsons*, 7 App. Cas. 87, 121.

The third statutory condition requires the insured to give notice in writing to the company or its local agent of any change material to the risk promptly upon its coming to his knowledge: three or four of these houses were, to the plaintiff's knowledge, vacant and unoccupied for some months before the fire and the plaintiff gave no notice to the defendants.

Judgment.

Street, J.

I think, upon the evidence of the insurance agents given at the trial, we should hold that the fact of these houses having become and remained vacant was a change material to the risk and that the risk was increased by it. Their evidence is strongly confirmed by the fact, which may be referred to for this purpose at all events, that they have attempted to declare in their conditions that the vacancy of a house shall *ipso facto* terminate the insurance. See also *Peck v. Agricultural Ins. Co.*, 19 O. R. 494.

There is a limitation in the statutory condition that the policy shall be avoided only "as to the part affected" by the change and the failure to communicate it to the company. The question what is the part affected here is one of fact, and in my opinion the evidence as to the structure of the block of buildings in question, lightly built as they were, of inflammable materials, with thin partitions, and under one roof, can lead to but one conclusion, namely, that an increase in the risk of fire to one house was not a danger limited to that particular house but involved the whole block. I should, perhaps, point out that the vacancy of the house which the insured intended to occupy himself would not have avoided the policy as a change material to the risk, because the company must be taken to have accepted the risk knowing that this particular house was not occupied.

With regard to the creation of the subsequent encumbrances, a circumstance relied on as a change material to the risk, I am of opinion that the provisions of the third statutory condition cannot be distinguished from those of the first statutory condition in so far as the meaning of the word "risk" here is concerned and that matters relating to the title of the property insured are not covered, following *Reddick v. The Saugeen Mutual Fire Ins. Co.*, 14 O. R. 506, and the cases there referred to on the point.

The plaintiff in his notice of motion and in the argument before us contended, however, that even if he could not have succeeded upon the terms of the policy as they are

set forth on its face, he is, nevertheless, entitled to the benefit of the agreement entered into between the loan company and the defendants, by which as between those two parties the policy was practically made unconditional.

Judgment.
Street, J.

I do not read the case of *Imperial Fire Ins. Co. v. Bull*, 18 S. C. R. 697, as supporting this contention and a perusal of the judgments themselves does not aid it. That case establishes that an insurance company, having entered into a subrogation agreement, similar to that here in question, with a mortgagee, who insures for the mortgagor, as well as himself, or who holds as mortgagee, a policy taken out in the name of the mortgagor cannot after paying to the mortgagee a loss incurred under the policy take an assignment of the mortgage and hold it against the mortgagor, even though they could shew if allowed to do so that the mortgagor, apart from the terms of the subrogation agreement, never had any claim against them.

But I can find no authority in it for holding that the effect of an agreement between the mortgagees and the insurance company, strictly limited to the extent of the mortgagees' interest is to have the effect of doing away as between the mortgagor and the insurance company with the conditions upon which the policy was issued, and entitling him to recover money with which the agreement never affected to deal.

The counter-motion of the defendants is disposed of adversely to them by the decision in *Imperial Fire Ins. Co. v. Bull*, above referred to.

Upon the whole, I think that the judgment is right and should be affirmed and that the motion and cross-motion should both be dismissed without costs.

ARMOUR, C.J., concurred.

G. A. B.

[COMMON PLEAS DIVISION.]

SILLS v. WARNER.

Will—Devise to Religious Body—Minister's Residence—Necessity for User—R. S. O. ch. 237, secs. 1, 23—38 Vict. ch. 76, sec. 10—Gift for School Teacher's Residence—Invalidity—9 Geo. II. ch. 36.

A testator by his will, made more than six months prior to his death, directed that after his wife's death a house and lot should go to the trustees, for the time being, of a named Presbyterian Church for a manse, if required, or that it might be kept in good repair and rented for the benefit of the congregation. The widow died shortly before the commencement of this action, which was for the construction of the will, and the land had not yet been used for a manse :—

Held, that the devise was valid, for section 23 of the Religious Institutions Act, R. S. O. ch. 237, and sec. 10 of 38 Vict. ch. 76 (O.), enabled the trustees to take land for a minister's residence, if actually used as such, although it could not be held merely for the purposes of rental : that an intention not to so use it would not be presumed from the non-user for the short period that had elapsed since the widow's death ; but that, in any event, the effect of such non-user would be that the interest of the trustees in the property could be sold within seven years, as provided for by that section, or that the property would revert to the testator's heirs ; and, *semble*, that the trustees could legally sell.

By another clause, certain other land was devised to the trustees of a named common school section, on which a teacher's residence might be erected, or that it might be rented for the benefit of the school funds, subject, however, to a condition of preserving and keeping in order an adjoining plot :—

Held, a devise for charitable purposes within the 9th Geo. II. ch. 36, and so void.

Statement.

THIS was an action for the construction of the will of Henry Pultz and the administration of his estate, tried at the Fall Assizes, 1895, at Napanee, before MEREDITH, C. J.

Clute, Q.C., for the plaintiff.

Warner, for the defendant Warner.

Smoke & Wilson (Napanee), for the defendants Wilkison, Carson and Amey.

Ruttan, for the official guardian.

Deroche, Q.C., for the defendants the school trustees, and the defendants the trustees of the Presbyterian Church, Wilton.

Preston, Q.C., for certain legatees.

Gibson, for the Attorney-General of Ontario.

The learned Chief Justice reserved his decision and subsequently delivered the following judgment, in which the clauses of the will in question are set out :—

Judgment.
Meredith,
C.J.

January 3rd, 1896. MEREDITH, C. J.:—

I disposed of the case at the close of the argument, except as to two questions arising on the will, namely, as to the validity of the devise contained in the 9th paragraph, in favour of the trustees of the Presbyterian Church at Wilton; and as to the validity of that contained in the 16th paragraph, in favour of the school trustees.

The will was made on the 22nd September, 1879, and the testator died on the 30th June, 1884.

The devise to the trustees of the Presbyterian Church, Wilton, is as follows :—

"9. After the decease of my said wife,* I give and devise the said last mentioned lot and house, a part of lot number 39 in the 6th concession of the said township of Ernesttown, to the trustees for the time being of the Presbyterian Church in Wilton and their successors in office, for a manse if required, or to be kept in good repair and rented for the benefit of the congregation of the said church; and, in case the Presbyterian church ceases to exist as a church organization in Wilton and a Congregational Church should be organized in its stead, then I give and devise the said lot and house to the trustees of the said Congregational Church for the time being and their successors in office, for rental and benefit of the said Congregational Church or for a parsonage. I make this devisé in recognition," etc.

This devise is in my opinion valid.

By R. S. O. ch. 237, sec. 23, "Any religious society or congregation of Christians in Ontario may, by the name thereof, or in that of trustees, from time to time take or hold by gift, devise or bequest, any lands, tenements, or

*By the will a life estate in the land was devised to the wife, who died in 1895, shortly before the commencement of the action.

Judgment. interests therein, if such gift, devise or bequest is made
Meredith, at least six months before the death of the person making
C.J. the same ;” and similar power is conferred on the Presbyterian Church by its special Act of Union, 38 Vict. ch. 76, sec. 10 (O.).

Section 23 of the general Act, however, provides that the annual value of the land taken or held under the authority conferred by it shall not at any one time exceed in the whole \$1,000, and that no land so acquired, other than land used for any purpose specially mentioned in section 1, shall be held by the society or congregation for more than seven years after the acquisition of it, but within that time must be absolutely disposed of by the society or congregation, which is given power in its name or that of trustees for it, to grant and convey the land to any purchaser, and the proceeds of the sale are to be invested in certain named classes of securities for the use of the society or congregation ; and the section also provides that as to such lands as are not so disposed of within the seven years, they are to revert to the person from whom they were acquired, his heirs, executors, administrators or assigns.

Section 10 of the special Act contains a somewhat similar provision, the principal difference between the two provisions being as to the actual value of the lands which may be taken or held, and the absence from the special Act of any provision as to the use for which the investments in the named securities are to be made.

Nothing turns in this case upon the provision as to the annual value of the lands, but the obligation to dispose of them within the seven years, and the consequence of not doing so, apply, unless the land is used for the purpose of a manse. A minister's residence is one of the purposes specially mentioned in section 1 of the general Act, but the renting of the land and applying the rents to the general purposes of the society or congregation would not appear to be so.

The devise may, in my opinion, be upheld as a devise for one of the purposes specially mentioned in section 1 of

the general Act. It is true that the land is to be used as a manse if required ; but it was not shewn that it is not required for that purpose, and I ought not to assume that it is not so required from the mere fact that it has not for the short period which has elapsed since the death of the testator's widow, which took place during the year 1895. The only consequence of its not being so used is that the trustees are required to sell it within the seven years, at the peril, in the event of their not doing so, of its reverting to the heirs of the testator.

Judgment.

Meredith,
C.J.

The provision requiring the land to be disposed of, even if I ought to hold differently as to the point just dealt with, does not, I think, operate to defeat the devise which is in other respects valid. It may be that the Acts referred to will enable the trustees to sell ; but, even if they do not, the only consequence, I take it, flowing from their inability to sell will be that the land may revert to the heirs of the testator ; nor do I see why, at all events, the interest of the trustees of the Presbyterian Church in the land may not be sold—"lands, tenements, or the interest in them" taken or held are what is to be sold, so that a sale by these trustees of their interest in the land would be within the very words of the statute. If the devise had been to them for a term of years and afterwards the lands were devised to another charity, there is nothing in the Act which even impliedly forbids the taking and holding subject to the obligation to dispose of it within the seven years of the term of years, and, if that be so, what difference can it make that, as in this case, the interest devised is probably a fee simple subject to an executory devise in favour of another religious body. It can, I think, make no difference ; and the devise is valid on this ground also.

The devise to the school trustees is as follows :—

"16. I give and devise to the trustees of the common school in the section in which the land is situate, and their successors in office for the time being, a quarter of an acre of land" (describing it) "on which they may erect a residence for the teacher of said school for the time being,

Judgment.
Meredith,
C.J.

or may rent it for the benefit of the funds of the said school section, subject, however, to the following condition—that the trustees shall preserve and keep in good order the plot of ground adjacent thereto on the said lot, 36 by 24 feet, lying between the said road on the west and the burial plot occupied by the late Milton Fish, Esquire, and his family on the east, and shall keep the said plot well fenced, and shall paint the iron fence enclosing the graves of my brother and mother and myself and wife once in every five years.”

This devise is in my opinion invalid.

It is a devise for a charitable purpose (Tudor on Charitable Trusts, 3rd ed, p. 5); and therefore void under the provisions of the Georgian Mortmain Act (9 Geo. II, ch. 36), unless the devisees are excepted from the operation of that statute.

I have been unable to find any legislative provision of that character and I have been referred by counsel to none.

The statute has been held to apply to municipal corporations and to bodies exercising some of the functions of government, and indeed to a devise to the sovereign himself: *Brown v. McNab*, 20 Gr. 179; Tudor on Charitable Trusts, 5th ed., pp. 11 to 15, and the cases there cited.

There will be judgment * *

1. Declaring the devise contained in paragraph 9 valid.
2. Declaring the devise contained in paragraph 16 void.

G. F. H.

[QUEEN'S BENCH DIVISION.]

DONNELLY V. AMES.

Ejectment—Evidence—Possession—Presumption—27 & 28 Vict. ch. 29, sec. 1 (C.).

In an action for the recovery of land, proof of possession is *prima facie* evidence of title, and in the absence of proof of title in another is evidence of seisin in fee; if, however, it be proved that the title is in another, although the defendant does not claim under or in privity with such other, the plaintiff's action will fail.

Where, in such an action, the plaintiffs claimed to have acquired a title thereto by possession, originally that of a squatter, commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee or those claiming under him:—*Held*, under 27 & 28 Vict. ch. 29, sec. 1 (C.), that in order to bar the right of the patentee forty years' possession at least was necessary; and the action therefore failed as against the defendant in possession though not claiming through or in privity with the patentee.

THIS was an action tried before MEREDITH, C.J., without *Statement*. a jury, at Kingston, at the Autumn Assizes of 1895.

Walkem, Q. C., and *J. B. Walkem*, for the plaintiffs.
Shepley, Q. C., and *Mudie*, for the defendants.

The action was to recover possession of the south-west quarter of lot number 17, in the first concession of the township of Loughborough, now Storrington, in the county of Frontenac.

The learned Chief Justice reserved his decision and subsequently delivered the following judgment in which the facts are stated:—

January 3rd, 1896. MEREDITH, C.J.:—

The plaintiffs claim title under the will of James Donnelly, who died in November, 1850, having made his will bearing date the 19th day of the same month, by which he devised to his wife, Isabella, the lands in question and his live stock and other property, and by which he further provided as to his estate, in these words, which follow the devise to his wife: "and which may be willed

Judgment.
Meredith,
C.J.

or devised by her amongst her children as she thinks proper previous to her death ; provided she should marry again, the lands and other (*sic.*) to be sold by the executors and the proceeds to be equally divided amongst her surviving children."

It was proved that James Donnelly was in possession of the land in question at the time of the making of his will and at the time of his death, and that he had been in such possession for fifteen years before he died, and had built a stone house, barns and sheds, and made other improvements on the land during that time.

No evidence was given to shew when or how the testator derived his title, except that it was stated by the plaintiff, Eliza Donnelly, that the land had been purchased by her father, and that it was like other land in the neighbourhood, "squat land."

The patent of the land was shewn to have issued to John Hybert on the 17th May, 1802.

The testator had been twice married, the issue of the first marriage were a son John, who died about twenty-six years ago intestate and without issue, and a daughter, and there were seven children issue of the second marriage ; of these, one Thomas died many years ago, being then fifteen or sixteen years of age ; another, Margaret, married and died, it was not shewn when, leaving two children who are still living ; a third, James, left Canada many years ago, and had not been heard of for fifteen or sixteen years before the trial ; and the plaintiffs are the remaining four of these seven children.

The widow, Isabella, continued to reside on the land with two at least of her children for several years, probably from five to eight, after her husband's death, when she left it, having rented the land to a man named Shaw ; and it did not appear that she had afterwards resided on the land or been in receipt of the rents and profits of it. She died on the 22nd October, 1893, intestate.

The will was not registered.

Robert Bruce is shewn to have been in possession by

his tenant, one Irwin, in the fall of 1866, and on the 18th January, 1867, being still in possession, he sold and conveyed the land for valuable consideration to John Smith, who had no notice of the will, and who went into possession in the following spring. He and those claiming under him, have been in possession ever since, and that possession has been continuous and uninterrupted. The land has passed by a chain of conveyances from Smith and several successive purchasers, down to the defendants, who are now in possession. The purchasers have in each case been for value and without notice; and all of these conveyances have been duly registered.

Judgment.

Meredith,
C.J.

It was not shewn when or how Bruce derived title; nor did either side deem it necessary to shew how, or by whom, or under what title the land was occupied after the testator's widow left it down to the time Bruce was shewn to have been in possession in the fall of 1866, a period of from eight to eleven years.

It is not necessary to determine what estate, if any, the children of Isabella Donnelly took in the land under the will; but it is probable that those of them who survived her, took by implication an estate in fee simple in remainder expectant on the estate during widowhood devised to her: Farwell on Powers, 2nd ed., 465; Theobald on Wills, 4th ed., 263, 609-610; *Moore v. Foliot*, 19 L. R. Ir. 499, 502; *Re Brierley*, *Brierley v. Brierley*, 43 W. R. 36.

It is, I say, unnecessary to determine that point, because, even if the children took nothing by the will, the remainder expectant on the determination of the estate of the widow passed to the heir-at-law John, and the plaintiffs as some of the heirs-at-law would be entitled in common with their co-heirs, and may recover their undivided shares, if the heirs be entitled to recover at all.

The first question to be decided is, whether upon the facts proved, the plaintiffs shewed title to recover against the defendants either the whole land or an undivided part of it.

It has been determined by decisions binding on me that

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Meredith,
C.J.

proof of possession is, in an action such as this, *prima facie* evidence of title, and no other interest appearing in proof, evidence of seizin in fee: *Doe d. Hughes v. Dyeball*, Moo. & M. 346; *Doe d. Carter v. Barnard*, 13 Q. B. 945; *Eccles v. Paterson*, 22 U. C. R. 167.

It is equally clear upon the authorities that a plaintiff must, in an action for the recovery of land, succeed upon the strength of his own title, and that if it be proved that the title is in another, the action fails, even though the defendant be in possession, not claiming under or in privity with that other: *Doe d. Carter v. Barnard*, *supra*; *Roe d. Haldane v. Harvey*, 4 Burr 2284, 2487; *Doe d. Dawn v. Horn*, 3 M. & W. 333; *Culley v. Doe d. Taylerson*, 11 A. & E. 1008, and many other cases.

In this case had nothing else been shewn, the proof given of the possession of the testator would have been evidence of his seizin in fee, and sufficient, apart from any question arising under the Statute of Limitations, to entitle those deriving title from him, to recover against the defendants who shew no title in themselves.

It appeared in evidence, however, that the land had been patented to John Hybert; and it is urged on the part of the defendants that that fact alone, or at all events coupled with the statement of the plaintiff, Eliza Donnelly, that the lands were "squat lands," prevents the presumption of the seizin in fee of the testator arising.

I am of opinion that the defendant's contention is well founded and must prevail. If it be, as it is, clear that proof of a prior possession to that of the testator would have prevented the presumption of his being seized in fee arising, although that prior possession was wholly unconnected with the defendant's title or possession, it would seem *a fortiori* that proof of the actual seizin in fee of another should exclude such a presumption. In the one case the fact of the seizin in fee of another is proved, while in the other it is presumed from the possession and the absence of proof of any other interest.

In this case the seizin in law and in fact of John

Hybert was proved, he being, as I have already mentioned, the grantee of the Crown of the land under the letters patent of the 17th May, 1802. See *Weaver v. Burgess*, 22 C. P. 104.

Judgment.
Meredith,
C.J.

There remains the question whether such a possession of the testator and those claiming under him was proved as extinguished the title of the patentee by operation of the Statute of Limitations. It must, I think, be taken that the land when patented was in a state of nature. The utmost length of the time that the testator and those claiming under him have been shewn to have been in possession, assuming the possession of the widow to have continued down to the fall of 1866, was thirty-five years, and by the effect of 27 & 28 Vict. ch. 29, sec. 1 (the Act then in force), the Statute of Limitations did not begin to run against Hybert, the patentee, until he had knowledge of the possession which is now being set up against his title, unless that possession had existed for forty years, in which case his right would be extinguished at the expiration of the forty years.

No entry having been made by the patentee and there not having been forty years' possession by the testator and those claiming under him, it was incumbent on the plaintiffs to shew knowledge by the patentee or those claiming under him of the fact of the land being in the actual possession of the testator or those under whom he claimed upwards of twenty years before the fall of 1866 (putting the case in the most favourable way for the plaintiffs) in order to extinguish the title of the patentee or those claiming under him, and such notice, or any notice such as the statute required, in order that the statute shall begin to run was not proved: *Weaver v. Burgess*, *supra*, at pp. 112-13; *Doe d. McKay v. Purdy*, 6 O. S. 144.

The plaintiffs' case therefore fails, and it is unnecessary to consider the question raised by the defendants as to the effect of the Statute of Limitations, having regard to their proved possession, on the title of the plaintiffs and as to the effect of the Registry Act to render void, as it was

Judgment. contended it did, the will as against the defendants and those under whom they claim as subsequent purchasers for value without notice of the will and having registered the conveyances under which they claim.

**Meredith,
C.J.**

The action will be dismissed with costs.

G. F. H.

[QUEEN'S BENCH DIVISION.]

SMITH V. THE CORPORATION OF THE TOWNSHIP OF
ANCASTER.

*Municipal Corporations—Way—By-laws Transferring and Assuming
Roads—Invalidity.*

A township corporation on which has devolved a portion of a public road situate within its territorial limits, relinquished by the Minister of Public Works under section 52 of 31 Vict. ch. 12 (D.), cannot authorize another township corporation to assume control of and keep in repair such portion of the road, nor can the latter township assume the road and lawfully collect tolls thereon, and by-laws passed for such purpose are invalid.

Corporation of Ancaster v. Durrand, 32 C. P. 563, distinguished.

Statement.

THIS was an action by a resident of the township of West Flamboro' against the township of Ancaster, and the lessee of a toll gate from the latter corporation on the Hamilton and Ancaster road. The plaintiff was accustomed to travel through the town of Dundas and over the Dundas and Binkley toll road, on to the Hamilton and Ancaster road to the city of Hamilton, and claimed that the tolls collected from him and others by the latter road, were excessive, and sought to restrain the defendants from collecting such tolls. The Hamilton and Ancaster road leads from the western limit of the city of Hamilton, which divides that city from the township of Barton, and through that township in a westerly direction, into and through the township of Ancaster, and was under the control of the latter township.

The road in question was originally constructed as a public road, and was under the management of the Minister of Public Works, who, under the provisions of 31 Vict.

ch. 12, sec. 52 (D.), on the 5th November, 1874, proclaimed Statement
that it was no longer under his control.

The township of Barton, on 11th January, 1874, by by-law, authorized the defendant corporation to assume control of that portion of the road situate within Barton, and subsequently the township of Ancaster by by-law assumed control and management of the road, placed a toll gate thereon situate in Barton, and passed by-laws fixing tolls, and collected toll from persons using it.

The action was tried on 5th May, 1895, before ROBERTSON, J., who reserved his decision, and subsequently on 20th June, 1895, gave judgment in favour of the plaintiff, among other matters declaring that the defendant corporation was not entitled to collect more tolls from the plaintiff and others than was necessary to keep the road in repair.

The defendants moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered in their favour.

In Michaelmas Sittings of the Divisional Court, 1895, composed of ARMOUR, C. J., and STREET, J., the motion was argued.

G. Lynch-Staunton, for the plaintiff.

Walter Cassels, Q. C., and *Waddell*, for the defendants.

The Court raised the question as to the validity of the by-laws, and a further argument was directed on this point, when the same counsel appeared.

January 27, 1896. The judgment of the Court was delivered by

ARMOUR, C. J. :—

A macadamized road was, by the Act 7 Will. IV., ch. 78, authorized to be built from "the town of Hamilton by the way of Ancaster, in the district of Gore to the town of Brantford, in the same district."

By section 17 of the Act 4 & 5 Vict. ch. 38, this road was vested in the board of works; and by subsequent legislation, became vested in Her Majesty, and under the

Judgment. control and management of the Minister of Public Works, Armour, C.J. and subject to the provisions of the Act 31 Vict. ch. 12 (D.).

Under the authority of section 52 of the last mentioned Act, the Governor by proclamation, dated the 5th day of November, 1874, declared that from the 7th day of November, 1874, the said road, under the management and control of the Minister of Public Works, should be no longer under his control; and thereupon, by virtue of the said section, the said road after the said 7th day of November, 1874, ceased to be under the management and control of the said Minister; and no tolls were thereafter leviable thereon under the authority of the said Act.

By section 53 of the last mentioned Act, it is provided that, "any public road or bridge declared as aforesaid to be no longer under the management of the Minister, shall be under the control of, and shall be maintained and kept in repair by the municipal or other authorities of the locality, and the road officers thereof, in like manner with other public works and bridges therein under their control."

A portion of the said road is within the township of Barton, and another portion thereof within the township of Ancaster.

On the 11th January, 1876, the council of the township of Barton, passed a by-law that, subject to the conditions thereafter mentioned, it should and might be lawful for the municipal council of the township of Ancaster, for the purpose of placing and continuing the same in a good state of repair, to take possession of the public road known as the Hamilton and Brantford macadamized road, situate in the township of Barton, and to continue such possession so long as the said road should be kept in good and proper state of repair for a toll road by the said council, but no longer.

On the 12th February, 1876, the council of the township of Ancaster passed a by-law assuming the said Hamilton and Brantford road, situate in the townships of Ancaster and Barton.

Neither of these by-laws had any validity, for the township of Barton had no authority to empower the township

of Ancaster to take possession of that portion of the said road within its limits, and the township of Ancaster had no power to assume that portion of the said road within the township of Barton. Judgment.
Armour, C.J.

The township of Ancaster maintains a toll gate, called gate number one, on that portion of the said road situate within the township of Barton; and the plaintiff's complaint is, that a greater toll is exacted at this gate than is by law allowed; and in order to ascertain this, it is necessary to determine what amount of toll can be legally exacted by the township of Ancaster at this gate; and it seems clear that there is no authority in law empowering the township of Ancaster to maintain this toll gate in the township of Barton, and consequently there is no authority in law empowering the township of Ancaster to collect any toll thereat.

The judgment in *Corporation of Ancaster v. Durrand*, 32 C. P. 563, was founded upon the presumption against the defendants of the existence of a state of facts which the evidence in the present case displaces, and the decision is, therefore, not binding upon us.

The plaintiff's statement of claim was based on the validity of these by-laws, and on the right of the township of Ancaster to maintain the said toll gate, and to take toll thereat, and on the allegation that they were taking thereat a greater toll than allowed by law; and it is only by reason of our being compelled to determine what amount of toll can be legally exacted at this gate, that the question of the right to take any toll thereat arises.

The plaintiff should be allowed to amend his statement of claim, attacking directly (and not indirectly as it at present stands), the right of the defendants to take toll at the said gate.

And there should be a declaration that the defendants are not entitled to take any toll at the said gate, and an injunction restraining the defendants from doing so.

And there should be no costs to either party of this litigation.

STREET, J., concurred.

G. F. H.

[DIVISIONAL COURT.]

LANGTRY V. CLARK ET AL.

Landlord and Tenant—Distress—Mortgaged Goods—Agreement between Bailiff and Tenant—Pound Breach—2 Wm. & M. sess. 1, ch. 5.

Where the goods of a tenant, which had been mortgaged by him, were distrained for rent and impounded, and were left on the premises in his charge for over three weeks by agreement between him and the bailiff, when on being advertised for sale under the distress they were seized and taken away by the mortgagee:—

Held, as regards the mortgagee, that the goods were no longer in *custodia legis*, and that in taking them he had not committed a breach of the pound within the meaning of 2 Wm. & M. sess. 1, ch. 5.

Statement. THIS was an appeal by the plaintiff from a judgment of the County Court of Grey in an action tried before the Judge of that County with a jury on December 11, 1895.

The following facts are taken from the judgment of the trial Judge:

This is an action for pound breach or *rescous* of goods under the statute, 2 Wm. & M. sess. 1 ch. 5, tried at the last December Sittings before me with a jury.

[The learned Judge then set out the terms of a lease of a farm by the plaintiff to one W. H. Abercrombie, and continued:]

On the 16th of July, 1895, C. C. Pearce, as bailiff of the plaintiff, under plaintiff's warrant dated 15th July, seized, *inter alia*, the goods in question for rent, served the tenant with an inventory and notice of distress and left the goods in charge of the tenant, taking the following agreement, signed by the tenant:

"Mr. C. C. Pearce, Sir,—I hereby agree to hold possession of the goods and chattels mentioned in the annexed inventory (seized by you to-day) under distress warrant as your man in charge (free of cost), and will not remove any of said goods nor allow them to be removed, and I will deliver the said goods and chattels to you on demand; and I will allow you to re-enter and take possession of the same at any time you may see fit, in order that they may

be sold to satisfy the amount claimed in the distress warrant under which you have seized the said goods and chattels, and I ask you not to advertise the said goods and chattels, until the 1st day of August, 1895; and in consideration of your leaving the said goods and chattels in my possession as mentioned above, I hereby release you from any action whatever, whether for trespass or otherwise, and I will pay any additional costs that may be incurred by reason of your leaving the said goods and chattels with me instead of proceeding at once to advertise and sell the said goods and chattels." Statement.

Nothing more was done by or on behalf of the landlord until the 8th August, when an advertisement of sale was prepared and on the 9th copies were posted up.

On the 10th August the defendant Clark, a chattel mortgagee, and the defendant Brown, his bailiff, seized and removed the goods under his chattel mortgage.

At the close of the case counsel for the defendant objected that there was no impounding of the goods, or if there was, it was abandoned as against the defendant Clarke and his co-defendant as his bailiff.*

To save the expense of a new trial on the facts, should it be held plaintiff was entitled to recover, I submitted certain questions to the jury, and reserved judgment on the point of law.

The jury found that there was a tenancy: that the plaintiff distrained *bond fide* for the rent; that the plaintiff's bailiff delivered a notice of seizure and inventory of the goods; took *bond fide* steps to execute the warrant, and left the goods with the tenant to hold for the plaintiff, and found a verdict in favour of plaintiff for \$45 damages.

[The learned County Judge then, after stating certain other facts not material to this report, proceeded]:

The landlord's bailiff did not leave the goods as impounded on the premises, as he might have done, for five days; but he actually gave them over to the possession of the tenant,

* There was another objection taken, but as the case does not turn on it, it is not necessary to refer to it.—REF.

Statement. * * prior to 11 Geo. II., ch. 19, the tenant was not a proper person to leave impounded goods in charge of, while under this statute the goods might have been impounded on the premises without leaving any one in charge, yet if in fact the possession and charge are given to the tenant, I am of opinion the goods are not in the custody of the law as against third persons' claims; I dismiss the action with costs: *Roe v. Roper*, 23 C. P. 76; *Whimsell v. Giffard*, 3 O. R. 1; *Harrison v. Barry*, 21 Rev. Rep. 781; 7 Price 690.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on March 2, 1896, before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

G. W. Patterson, for the appeal. The seizure was regularly made and the goods were in the custody of the law. The question is: Is it necessary to have anyone in possession, and if so, is the tenant not a sufficient and proper person? The jury have found there was no collusion. There is no necessity now for any one to be left in possession where there is no intention to abandon: *Swan v. The Earl of Falmouth*, 8 B. & C. 456; 6 L. J. Q. B. 374. 11 Geo. II. ch. 19, gives power to "impound or otherwise secure" on the premises. An open field may be a pound: *Castleman v. Hicks*, 1 Car. & M. 266. There was no intention to abandon as the taking of the agreement shews. On the question of a penal action, see *Brooks v. Noakes*, 6 L. J. Q. B. 376. I refer also to *Roe v. Roper*, 23 C. P. 76; *McIntyre v. Stata*, 4 C. P. 248; Foa's Law of Landlord & Tenant, 1st ed., 435; *Johnson v. Upham*, 2 El. & El. 250; *Thomas v. Harries*, 1 M. & G. 695, and foot note at p. 707; *Firth v. Purvis*, 5 T. R. 432; *Wood v. Nunn*, 5 Ring. 10.

Geo. Kerr, contra. The cases cited are all between landlord and tenant. Where third parties as here, are concerned the proceedings should be perfectly regular. Previous to the statute of William & Mary the goods had to be taken in pledge off the premises. Under 11 Geo. II. ch. 19, they could be impounded on the premises, but the actual impounding

had to be the same. Here, as between the landlord and the mortgagee, the goods were not *in custodia legis*. By taking the agreement and leaving them revested in the tenant, the landlord relied on the tenant's covenant, and the parties had contracted themselves out of the statute 2 W. & M.: *McIntyre v. Stata*, 4 C. P. 248. "Rescue is when the owner or other person, by force takes away a thing distrained from the person distraining, after the latter has been actually in possession; but if he never in fact had possession—as when disturbed in making the distress—it is no rescue": Woodfall's *Landlord & Tenant*, 12th ed., 452. See also *Sharp v. Fowle*, 12 Q. B. D. 385.

Patterson, in reply. The five day rule is for the benefit of the tenant to enable him to replevy. If an unreasonable time has not elapsed between seizure and sale, third parties cannot complain: see *Naylor v. Bell*, 14 Nova Scotia 444; Clarke's *Landlord & Tenant*, 558. *McIntyre v. Stata*, is distinguishable. In that case the execution debtor was not put in charge for the sheriff.

March 4, 1896. The judgment of the Court was delivered by

ARMOUR, C. J.:—

This action was not, in my opinion, maintainable under section 4 of 2 Wm. & M. 1 sess. ch. 5, for under the circumstances there was no pound breach within the meaning of the law.

The landlord had the right to impound and secure the goods distrained upon the demised premises and to keep them so impounded and secured and at the expiration of five days to sell them, and he had a reasonable time after the five days to sell them, and what would be a reasonable time for this purpose would be a question for a jury.

There is no finding in this case that a reasonable time for such purpose had not elapsed at the time of the alleged pound breach, nor, indeed, could there have been such a finding upon the evidence.

Judgment. There was a good distress and a good impounding, and **Armour, C.J.** as between the landlord and his tenant the agreement entered into between them bound the tenant and there could not be said that as between them there was any abandonment of the distress; but the difficulty in the plaintiff's way is that this agreement did not bind the mortgagee who was entitled to have the provisions of the law as to distress for rent carried out.

And the mortgagee was therefore entitled to say after the expiration of five days, and after a reasonable time for the sale and disposal of the goods distrained had elapsed, "the goods mortgaged to me are no longer impounded under the law, but under an agreement between the landlord and tenant by which I am not bound; they are no longer in the custody of the law, by virtue of the law, but in the custody of the landlord by virtue of the agreement between him and his tenant, and I will take them under the provisions of my mortgage," and having so taken them I do not think that he could be said to have committed a breach of the pound within the meaning of the statute under which this action was brought.

The appeal will, therefore, be dismissed with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

BEATTIE V. DINNICK.

Guarantee—Indemnity—Surety—Oral Promise—Promise to Answer for Debt of Another—Statute of Frauds (29 Car. 2, ch. 3), sec. 4.

A promise made by a third person to a creditor to pay or to see paid the debt due to him by his debtor, whether such promise is absolute or conditional, is a promise to answer for the debt of another, and is within the 4th section of the Statute of Frauds.

The plaintiff was the holder of a promissory note of an incorporated company of which the defendant was president, and was pressing for payment when the defendant verbally promised to see him paid if he would forbear to sue and would renew :—

Held, that this was not a promise of indemnity, but of guarantee, and therefore required by section 4 of the Statute of Frauds to be in writing.

Guild & Co. v. Conrad, [1894] 2 Q. B. 885, distinguished.
Judgment of FALCONBRIDGE, J., at the trial reversed.

THIS was an appeal from the judgment at the trial.

Statement.

The following facts are taken from the judgment of STREET, J., in the Divisional Court :—

This action was tried before FALCONBRIDGE, J., without a jury, at the Spring Assizes at Milton, on 5th March, 1895.

The plaintiff by his statement of claim alleged that in the year 1893 the defendant was president of "The Ontario Terra Cotta and Brick Company, Limited," which was then engaged in the manufacture of bricks at Campbellville, and that the plaintiff was the holder of a promissory note for \$309.15 against the company, which became due on 7th October, 1893: that upon the maturity of the note the plaintiff was pressing for payment, and the defendant, who was president of the company, in consideration that the plaintiff would refrain from suing said note and would not seek payment thereof from the said company, promised to pay the defendant the full amount of the said note and interest: that the plaintiff accepted the said offer of the defendant, and thereupon wholly abandoned his right of action against the company and applied to the

Statement. defendant for payment of the amount of the said note, but the defendant refused to pay the same.

The defendant by his statement of defence denied the statements above set forth, and pleaded the 4th section of the Statute of Frauds.

At the beginning of the trial the plaintiff applied for leave to amend by adding a count for goods sold and delivered to the defendant, to the amount of \$34.43, in September, 1893. Notice had been given some days before to the defendant by the plaintiff of his intention to apply for leave to make this amendment. Evidence upon the count was taken at the trial, and the amendment was treated as having been made.

The plaintiff in his evidence at the trial said that he had held a note made by the company in his favour, which fell due about 1st July, 1893: that shortly before it fell due, or when it had come due, he went to the defendant, at the office of the company, and asked him if he knew the note was due, and what were his intentions about it? He said, "Yes, but that they had not any money." Then plaintiff said, "this thing cannot go on any longer; give me some money, I cannot do without it any longer. He said he had no money, and I had obliged him before, and if I renewed this note again for him he would see I got my money. I told him I was going to sue; he asked me not to sue the company, and he would see I got my money." The plaintiff then went on to say that a day or two afterwards the defendant brought him a new note made by the company payable to the plaintiff's order for \$309.15, the amount of his claim against the company; that he took the note and discounted it with the Bank of Hamilton; that it was not paid at maturity, and he had to take it up.

Another witness named Roberts, called by the plaintiff, said he was present on the occasion referred to. He said: "Mr. Beattie came down and threatened he would sue the company for his account; it had gone long enough; he could not let it go any longer, he would sue it. Mr.

Dinnick said not to sue the company; he would see he was paid every cent; to take another note and help the company out of the difficulty. Mr. Beattie said he would do it if he would give him his word he would be paid it, and he said he would. Mr. Beattie turned around to me and said, 'you are a witness to that,' and I said 'yes.' Statement.

This was the evidence in support of the claim of the plaintiff for the amount of the note. The defendant denied upon oath having had any conversation with regard to the matter, or that he ever at any time made any of the promises relied on.

With regard to the account for \$34, the plaintiff said that he kept a general store and supplied the goods in question to the employees of the company at the defendant's request, and upon his promise to see that the plaintiff was paid for them. The evidence of the witness Roberts was as follows upon this subject. Speaking of this account, he says: "That is for supplies to the works; I always kept the store book. Mr. Beattie had refused to supply anything more. I then asked Mr. Dinnick what I was to do about that, as we were in want of coal oil and other things, and he said to me to go up to Mr. Beattie and tell him I am responsible for it, and Mr. Beattie will let you have whatever you want." Another witness, Lewis, says he heard the plaintiff come in and enquire for his account; he asked for his money; the defendant said he could not do anything for him then, but he would see that he got his money.

The defendant denied these conversations also.

At the conclusion of the argument the following judgment was delivered:—

FALCONBRIDGE, J.:—

There is a recent case which goes a long way to destroy the application of the Statute of Frauds to the present case. This is a case in which there can only be one finding on the question of fact—because Mr. Beattie swears—and

Judgment. is corroborated by Mr. Roberts—to a promise in some form of words; therefore, on the evidence which must govern a jury and govern me, I find the issue of fact in favour of the plaintiff.

Falconbridge,
J.

The only remaining question is as to the effect of the Statute of Frauds, which says, no action can be brought against a party on a promise to answer for the debt or default or miscarriage of another, unless the representation or assurance be made in writing, signed by the party to be charged therewith. The effect of that statute has been very much impaired by the case which I have mentioned. I find here that this is an independent promise; it is not a guarantee. The debt had been already incurred, and the plaintiff forebore to sue the company in consideration of the defendants' promise. I give judgment for plaintiff, both on the note and on the account.

During the Michaelmas Sittings, 1895, of the Divisional Court the defendant moved to set aside this judgment and to enter judgment for him with costs, or for a new trial.

The motion was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.), on the 25th November, 1895.

Aylesworth, Q. C., for the motion. The evidence shews that the defendant only promised he would see the plaintiff got his money and stipulated for a renewal of the note. Such a promise is within the Statute of Frauds. The original debtor, the company, still remained liable, and there was no liability on the defendant outside of his promise: *James v. Balfour*, 7 A. R. 461. If he had made a distinct independent promise to pay, that might have bound him. This was a promise to answer for the debt of another: *Lee and Cameron v. Mitchell*, 23 U. C. R. 314; *Hoener v. Merner*, 7 O. R. 629; *Poucher v. Treuhey*, 37 U. C. R. 367; *Lakeman v. Mountstephen*, L. R. 7 H. L. 17. In *Guild &*

Co. v. Conrad, [1894] 2 Q. B. 885, there was special language used which justified the meaning put upon it by the Court. Argument.

J. W. Elliot, contra. The appeal is against the whole judgment, and the evidence shews the promise was made before the goods were supplied, so the plaintiff must succeed as to that item in any event. The company wanted money, and the plaintiff was induced to become liable for a larger sum as a consideration for the defendant's promise to pay: *Guild & Co. v. Conrad*, [1894] 2 Q. B. 885. The defendant was president of and a shareholder in the company, and being so interested, the promise was for himself as well as another. I refer to *De Colyar on Guarantees*, Bl. ed., 45, 92 *et seq.*; *Wildes v. Dudlow*, L. R. 19 Eq. 198; *Brandt on Suretyship*, vol. 1, 2nd ed., p. 95, sec. 70; *Trustees of Free Schools, etc. v. Flint*, 13 Met. (Mass.) 539; *Emerson v. Slater*, 22 How. (U. S.) 28.

Aylesworth, Q. C., in reply. There was no further advance at the time of the promise. In *Wildes v. Dudlow*, the promise was in consideration of undertaking a liability. Here there was only a promise to pay if the company did not.

February 27, 1896. The judgment of the Court was delivered by

STREET, J.:—

The plaintiff's claim allowed by the judgment consists of two parts, which require to be separately considered. The first part is the amount of a promissory note made by "The Ontario Terra Cotta and Brick Company, Limited," payable to the plaintiff or his order for \$309.15, dated 4th July, 1893, three months after its date, which was itself a renewal of a former note between the same parties maturing at about the date of the renewal. The second part of the claim was introduced into the pleadings for the first time at the trial, by amendment, and consists of a sum of \$34.43, the amount of an open account for goods sold and delivered, as was alleged by the plaintiff, to the defendant after 4th July, 1893.

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Street, J.

The claim against the defendant for the amount of the note is based upon a verbal promise said to have been made by the defendant to the plaintiff at or about the time of the maturity of the original note, that is to say, at the end of June or the beginning of July, to the effect that if the plaintiff would forbear to sue the company upon the note and would renew it, he, the defendant, would see that he got his money. The plaintiff says that he forebore to sue and renewed the note for three months, relying upon this promise.

The defendant has denied upon oath having made any such promise, but my brother Falconbridge, who tried the case, has found that in some form of words such a promise was made by him, and the question of fact must be treated as having been settled adversely to the defendant.

The question as to whether the promise was one which can be supported as a binding one, notwithstanding the 4th section of the Statute of Frauds, was treated before us by counsel for the plaintiff as depending simply upon the question of its form, that is to say upon whether it was a conditional promise to pay only in case the company should not do so, in which event it was admitted the statute would apply; or an absolute promise to pay without any condition at all, in which event it was assumed the statute would not apply. The judgment appears, as I understand it, to proceed upon the same view of the law, and the Judge, finding as a fact, that the promise was an absolute and not a conditional one, proceeded to give judgment against the defendant, treating the case as being without the statute.

With great respect, I am unable to agree that this is the result of the authorities or the meaning of the fourth section of the Statute of Frauds as interpreted by them. The statute requires that a special promise to answer for the debt, etc., of another shall be in writing: a promise made by a third party to a creditor to pay or to see paid the debt due him by his debtor, is a promise to answer the debt of the debtor, whether the promise is conditional or

unconditional ; and I am unable to find any case in which the contrary has been held.

Judgment.

Street, J.

The case relied on by the plaintiff as establishing the contrary rule, and as drawing the distinction that an unconditional promise to pay the debt of another, was not affected by the statute, while a promise to pay only upon the default of the original debtor was within it, is *Guild & Co. v. Conrad*, [1894] 2 Q. B. 885, and this is probably the case referred to by my brother Falconbridge in his judgment, delivered at the conclusion of the trial of the present action.

An examination, however, of the judgments of the members of the Court of Appeal in that case, shews that no such distinction was intended to be established, and that the case turned upon an entirely different question.

A firm in Demerara had drawn certain accommodation bills of exchange on the plaintiff, the plaintiff refused to accept them ; the defendant, a third person, then promised the plaintiff that if he would accept the bills, he, the defendant, would provide funds to enable the plaintiff to meet them ; and it was held by the Court of Appeal that the promise had been rightly treated by the trial Judge, as a contract to indemnify the acceptor, and not as one to pay the bills if the Demerara firm should fail to do so.

The case is more fully reported in the Law Reports, than in any of the other series ; but it is plain from all the reports of it, that the only question considered, was, whether the promise was to be treated as a promise to pay the bills if the Demerara firm should not do so, in which event the statute would apply ; or as a promise to indemnify the plaintiff against his acceptance of them, in which event the promise would not be within the statute. It is true, that there is a sentence in the report, in (1894) 2 Q. B., at p. 892, of the judgment of Lord Justice Lindley, which, taken apart from the context, gives some colour to the contention of the plaintiff in the present case. Speaking of certain conversations between

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Street, J.

the plaintiff and the defendant, the learned Judge says : " I cannot help thinking that the true result of those interviews was this—that the defendant did promise the plaintiff that, if he would accept these batches of bills, he, the defendant, would take care that they should be met, and that he himself would provide funds to meet them ; and it was on the faith of that promise that the plaintiff accepted those bills. If this is the real contract, and if the learned Judge is right in saying that the contract was not a contract to pay if the Demerara firm did not pay, but was a contract to pay in any event, then, in my opinion, the authorities shew that the Statute of Frauds does not apply." Standing by itself, this sentence might be thought to uphold the rule for which the plaintiff here contends, but the Lord Justice immediately proceeds in his next sentence to give the authorities for the proposition he is laying down, he says : " The authorities are *Thomas v. Cook*, 8 B. & C. 728, and *Wildes v. Dudlow*, L. R. 19 Eq. 198." Both of the cases referred to plainly turn upon no other question than this—whether when one person induces another to enter into an engagement by a promise to indemnify him against liability that is or is not an agreement required by the Statute of Frauds to be in writing, and in both cases it is held that it is not.

The Lords Justices in *Guild & Co. v. Conrad*, had a good deal of difficulty in coming to the conclusion that the promise there made, was a promise to indemnify rather than a guarantee, but having once arrived at the conclusion that it was a promise to indemnify the plaintiff, they simply followed the decision in *Thomas v. Cook*, and held that it was not required to be in writing.

It is worth notice that in the reports of *Guild & Co. v. Conrad*, in 9 Rep. 746 ; 42 W. R. 642 ; 71 L. T. 140, and 10 Times L. R. 549, Lord Justice Lopes is reported as laying down in the broadest terms the proposition asserted by the plaintiff in the present case, namely, that a promise to be liable conditionally, that is to say, in case the principal debtor makes default, must be in writing, while a promise to

be liable, at all events, need not ; but in the report of his judgment in the Law Reports series, no such proposition is laid down ; and he states the question before the Court as being that, which in fact it was, viz., whether the promise found to have been made, was a guarantee or an indemnity.

Judgment.

Street, J.

The distinction between a promise to pay a debt already due a creditor, or one to be created upon the faith of the promise on the one hand ; and a promise that if the promisee will incur a liability, the promisor will indemnify him against it on the other hand, is not at all a shadowy one, and when the terms of the statute and the interpretation placed upon it by undisputed cases are considered, the reasons for holding the latter class of promises to be unaffected by it, while holding the former class to be within it, seem to be unanswerable. It has been well settled that the statute applies only to promises made to the person who is or is, because of the promise made to him, to become creditor, and does not apply to promises made to the debtor or any one else : *Eastwood v. Kenyon*, 11 A. & E. 438 ; *Wildes v. Dudlow*, L. R. 19 Eq. 198.

The promise intended by the statute is therefore a promise made to a creditor or intending creditor in that capacity. But where the promise is made to one who is not a creditor, that if he will incur a liability to some third person, the promisor will indemnify him against it, it is not made to him as a creditor at all, but rather in the character which he is asked to assume of debtor to the third person.

As the present case clearly falls within the first of these classes and entirely outside the second of them ; in other words, because the defendant's promise was a guarantee and not an indemnity, it remains unaffected by *Guild & Co. v. Conrad*.

I think it will be found that the well-known test suggested in the notes to *Forth v. Stanton*, 1 Wm. Saund. 211e, note, and repeatedly adopted, disposes of the supposed distinction between the effect of a promise to pay an existing debt if the debtor do not, and a promise to pay it

Judgment. unconditionally ; it is thus stated : "The question whether each particular case comes within the clause of the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise," that is, from the promise relied on. This test has been approved in *Fitzgerald v. Dressler*, 7 C. B. N. S. 374, 390 ; *Rounds v. May*, 35 U. C. R. 367 ; *James v. Balfour*, 7 A. R. 461, and many other cases.

Street, J.

It requires, first, that the original party shall remain liable, and second, that there shall be no liability on the part of the promisor excepting that which is created by the promise relied on.

In the present case there is no ground at all for holding that the Terra Cotta Company were discharged from their liability by the operation of the defendant's promise, so that the first requirement is clearly satisfied, and neither he nor his property were under any liability to the plaintiff before the making of the promise. It is true that he was president of the company which made the note, but that liability was exclusively the liability of the corporation, and not that of the individual members of it ; it is also true that he was a shareholder in the company, and that the value of his shares might be affected by the threatened action of the plaintiff, but his property was not liable for the debt or any part of it, in my opinion, in the sense intended by the principle upon which the test is founded. The ground for the requirement, that in order to bring a promise within the statute, there must be an absence of any antecedent liability on the part of the promisor is this : the statute requires that a special promise to answer for the debt, etc., of *another* shall be in writing ; it does not require that a promise to answer for a debt which is not the debt of another but is partly the debt of the promisor, shall be in writing : *Chater v. Beckett*, 7 T. R. 201 ; *Thomas v. Williams*, 10 B. & C. 664.

The ground for the requirement, that in order to bring a

promise within the statute, there must be an absence of antecedent liability on the part of the promisor's property, is not so satisfactory, but the rule seems clearly established. It is thus stated by Cockburn, C. J., in *Fitzgerald v. Dressler*, 7 C. B. N. S. 374, at p. 392: "If there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."

In *Tumblay v. Meyers*, 16 U. C. R. 143, Robinson, C. J., thus states this qualification of the terms of the statute; "Where there is a new and distinct consideration as the foundation or motive of the promise, as where the party who gives the promise derives a benefit or advantage which he did not before possess, accruing to him immediately and directly by means or in consequence of that promise (the promise not being a mere naked promise to pay the original debt on the footing of the original contract) a note in writing is not necessary, though the debt of another was the original cause of the undertaking," p. 145.

The cases to which this judicial qualification of the terms of the statute relates, seem to be carefully limited to those in which a new and substantial consideration passes between the person making the promise and the creditor, apart from the original consideration between the debtor and the creditor, from which the existence of some new contract between the creditor and the person making the promise, would naturally be inferred; just as in contracts for the sale of land, acts of part performance have been held to let in verbal evidence of a contract between the parties.

In the present case, there is no such new consideration

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Street, J.

Judgment. between the parties as is required by the authorities,
Street, J. and no benefit or advantage accruing immediately and directly to the defendant, so as to bring his promise within them.

In my opinion, therefore, the promise to pay the amount of the note, was a promise required by the statute to be in writing, and effect cannot be given to it.

With regard to the other portion of the plaintiff's claim, viz., the open account for \$34.43 for goods supplied to the company upon the promise of the defendant, I cannot say that the evidence that the defendant was the original debtor, and was so looked on by the plaintiff, is of a satisfactory character; and I should like to have seen his books for the purpose of verifying the fact that he sold the goods to the defendant and not to the company. But my brother Falconbridge has found in favour of the plaintiff upon this portion of the claim, and I am not in a position to say that his finding is erroneous; the amount involved is too small to justify the expense of further investigation, and I think the finding, therefore, should be allowed to stand.

The plaintiff should, therefore, have judgment for \$34.43 with Division Court costs, and the defendant should have his costs of defence of the action, against which the \$34.43 and the plaintiff's Division Court costs should be set off; and the defendant should have the costs of the motion to the Divisional Court.

G. A. B.

RE HENDRY.

*Division Courts—Judgment Debtor—Warrant of Commitment—"Backing"
Arrest Outside of County—R. S. O. ch. 51, secs. 242 and 243.*

The proceeding by judgment summons in a Division Court, and its consequences, are of a strictly local character.

A warrant of commitment must be directed to a bailiff of the county and to the gaoler of the county in which the proceedings are taken, and is not effectual beyond the limits of the county within which it issued, nor does the "backing" of the warrant by a magistrate in another county give it any force or validity there.

History of sections 242 and 243 Division Courts Act, R. S. O. ch. 51.

THIS was a motion by one J. F. Hendry, upon the return Statement.
of a writ of *habeas corpus*, to be discharged from custody
under the following circumstances.

Messrs. J. McLaughlin & Son, recovered a judgment against him in the Seventh Division Court of the county of Bruce, and having issued a judgment summons against him, obtained from the Judge presiding in that court, an order for his committal to the county gaol of the county of Bruce. Hendry, the judgment debtor, resided at the time in that county. Thereupon the clerk of the Court in pursuance of section 242 of the Division Courts Act, issued a warrant for his commitment, directed to Charles A. Richards, bailiff of the court, and to all constables and peace officers of the county of Bruce, and to the gaoler of the county requiring the bailiff and constables to arrest him and to deliver him to the gaoler of the county, and requiring the gaoler to receive him.

The defendant went away to the county of Dufferin, and was followed thither by Richards, the bailiff of the Seventh Division Court, Bruce, who held the warrant. He there procured a justice of the peace to endorse upon the warrant an order purporting to authorize Richards the bailiff and all constables and peace officers of the county of Dufferin to execute it. Thereupon, one Briggs, a constable of the county of Dufferin, arrested Hendry in that

Statement. county, and he was taken from that county into Bruce and lodged in the gaol there on the 3rd February, 1896.

The writ of *habeas corpus* having been granted on 18th February, 1896, with a *certiorari* in aid, all the papers were returned into Court upon motion to discharge the prisoner from custody. Notice of the motion had been served on the judgment creditors in the action in the Division Court, as well as upon the gaoler, and all parties appeared by their counsel on 21st February, 1896.

The motion was argued in Chambers on February 21st, 1896, before STREET, J.

R. McKay, shewed cause, and relied upon sections 51, 240, 242 and 243 of the Division Courts Act, R. S. O. ch. 51.

F. Cook, contra, referred to section 235.

Douglas Armour asked for an order for the protection of the gaoler.

February 25th, 1896. STREET, J. :—

There is no authority any where, so far as I have been able to find, for the "backing" of a Division Court warrant by a magistrate, and therefore the endorsement upon it by the magistrate in the county of Dufferin, purporting to give to it an effect which it did not possess, was an utterly futile act.

Under the 242nd section of ch. 51 R. S. O., the Division Courts Act, where an order of commitment is made upon a judgment summons, the clerk of the Division Court in which the order is made, is required to issue "a warrant of commitment, directed to the bailiff of any Division Court within the county, and the bailiff may by virtue of the warrant take the person against whom the order has been made."

Under the 240th section, the order for commitment must be to the county gaol of the county in which the party

against whom it is made, resides or carries on his business ; and by the 235th section, the judgment summons cannot be issued in any other county than that in which the debtor resides or carries on his business, and in some cases must be issued in the very Division Court within the limits of which he so resides or carries on his business.

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Street, J.

Under the 243rd section, all constables and peace officers within their respective jurisdictions, shall aid in the execution of every such warrant, and the gaoler of the county in which the warrant is issued, shall receive and keep the defendant in his gaol until he shall be duly discharged. Under the 244th section, a person so committed, is entitled to be discharged on payment of the debt and costs including the costs of the order for his commitment and arrest.

Under the 51st section, bailiffs are not to be required to travel beyond the limits of their division except in one specified case which does not arise here, and they are not allowed mileage for any distance outside the county in which their division is situated.

Under the 26th section, bailiffs are required to perform their duties as regulated by Act of Parliament and the Rules of Court.

All these sections seem to lead to the conclusion that the proceeding by judgment summons and its consequences are of a strictly local character. Special care is taken that the debtor shall not be summoned to a distance from his place of abode or business, to be subjected to examination ; and if committed, it must be under a warrant directed to a bailiff of the county and to the gaoler of the county in which the proceedings are taken ; and the officer to whom it is directed, is one who cannot be compelled to travel outside that county, and who is not permitted to charge fees for mileage beyond its limits.

These considerations all seem to tend strongly in the direction of requiring that I should hold that a warrant of commitment under the 242nd section of the Act, is not effectual beyond the limits of the county in which it is

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Street, J.

issued. The arguments against such a view, are first the language of sections 242 and 243 ; the former section provides that " the bailiff may, by virtue of the warrant, take the person against whom the order has been made ;" and the latter section requires that " all constables and other peace officers within their respective jurisdictions, shall aid in the execution of every such warrant." There is, it is argued, no limit put upon the bailiff as to where he may take the person, and therefore he may take him any where ; and the second argument is, that this construction ought to be placed upon the section, because otherwise the warrant might readily be evaded by the defendant stepping into an adjoining county.

I am of opinion that these arguments should not prevail. The scheme of the Division Courts Act, seems to be to limit the jurisdiction of the County Judge in Division Court matters, to the boundaries of his own county, except in certain cases, where it is a matter of necessity to give effect to his judgments or orders in other counties, for which special provision is made.

Thus it is provided by section 214, that except in a certain specified case, " no writ in the nature of a writ of execution or attachment shall be executed out of the limits of the county over which the Judge of the Court from which the writ issues has jurisdiction." One of the cases in which power outside the county is specially given is that with regard to subpoenas to give evidence, which are declared to be binding everywhere within the Province.

I think this view is strongly supported when the history of sections 242 and 243 is considered. They first appear in the statute book as section 95 of ch. 53 of 13 & 14 Vict. in the very form in which they still remain ; but in the original Act they are followed up by a provision in section 97, in which it is specially provided that it shall be lawful for the bailiff to whom any warrant of commitment is directed to execute the same in any county to which the defendant may have gone, or to send the war-

rant to the clerk of any other Division Court within the jurisdiction of which the defendant may be, with a farther warrant under his hand and the seal of the Court, requiring execution thereof, whereupon the clerk of the Court to which it is sent, shall affix the seal of his Court to it, and issue the same to his bailiff for execution; and such bailiff shall thereupon apprehend the defendant and convey him to the gaol of the county in which he shall have been so apprehended, where he shall be kept for the time mentioned in the warrant.

Judgment.
Street, J.

This clause does not appear in the Consolidated Statutes of Upper Canada of 1859, and it is marked in the Schedule of Statutes at the end of the volume, as having been superseded by ch. 125 of 18 Vict. (1855), which, however, does not make any other provision for the execution of warrants of commitment.

There appears, therefore, to have been for several years a section of the Division Courts Act in force, which specially authorized bailiffs to whom warrants of commitment were issued to act upon them out of the county from which they were issued, or to obtain execution of them by bailiffs outside such county. Along with this section were the two sections 242 and 243 of the present Act, forming section 95 of ch. 53 of 13 & 14 Vict. I think the conclusion must be that the framers of that Act, must have intended that the warrant of attachment authorized by section 95, should by virtue of that section standing alone, be executed only within the county in which it was issued; and that the special power given by section 97 above mentioned, was necessary to enable the bailiff to execute it beyond his own county. When then this special power is withdrawn, and the only power is that originally conferred by section 95 (now sections 242 and 243), it seems to follow that the bailiff's authority to execute the warrant, ceases beyond the limits of his county.

The defendant appears to have been arrested in the county of Dufferin by a constable of that county, and

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Street, J.

handed over to the bailiff to whom the warrant is directed, who conveyed him to the gaol in the county of Bruce. I think the reasoning which I have used with regard to the powers of the bailiff, leads to the conclusion that the constables and peace officers mentioned in section 243, mean the constables and peace officers of the county in which the warrant issues, and not those of any other county, so that the constable in Dufferin had, in my opinion, no more right to arrest the defendant in that county under this warrant, than the bailiff had.

Perhaps another reason in favour of the view I have taken is the enormous addition that would in many cases be made to the sum for which the debtor would be detained ; in the present case there is "mileage from Tara to Grand Valley, seventy-nine miles, \$9.40 ; and mileage from Grand Valley to Walkerton, sixty miles, \$12;" in all, \$21.40 for mileage alone ; the distance from one point to another being under eighty miles.

In many cases this might be doubled or trebled if the constable making the arrest, lived at a greater distance from the county in which the warrant issued.

In my opinion, an order should, for these reasons, be made, discharging the prisoner from custody. There will be no order as to costs, as the rule is not to give costs in such cases.

G. A. B.

[QUEEN'S BENCH DIVISION.]

SPENCE

V.

THE GRAND TRUNK RAILWAY COMPANY ET AL.

*Railways—Moving Train—Postal Car—Bare Licensee—Accident—
Negligence.*

The plaintiff in attempting to post a letter on a train which had just commenced to move out of a station, and to which was attached a postal car with an opening in the door for posting letters provided by direction of the Post Office Department for the use of the public, while following the car tripped and fell and was injured, as was alleged, on a stake some inches out of the ground, which had been planted by the defendants for the furtherance of alterations being made in the station :—
Held, that the plaintiff was a bare licensee upon the premises of the defendants, who under the circumstances, were not liable to him.
Judgment of MEREDITH, C.J., at the trial affirmed.

THIS was an appeal from a judgment at the trial Statement.
in an action brought by William T. Spence against the the Grand Trunk Railway Company of Canada, and the Canadian Pacific Railway for injuries sustained by the plaintiff, who in posting a letter on a mail car which was in motion, fell over a stake planted in the ground near the railway track, and had his hand cut off by the wheels of the train.

The mail car was attached to a train of the defendants the Canadian Pacific Railway, but the stake had been planted by an official of the Grand Trunk Railway Company acting under an agreement between the two companies to make certain alterations in the station premises.

The action was tried at Toronto, on January 27th, 1896, before MEREDITH, C. J., and a jury.

The evidence shewed that the plaintiff went to a station in the city of Toronto, for the purpose of posting a letter on an outgoing train which was at the station with a mail car attached, furnished with a slit in the door of the car for the purpose of posting letters, and that it was usual

Statement. to have letters posted on such cars up to the time the trains started, and sometimes after.

The plaintiff went to post his letter and the train started. He followed the moving train and tripped over the stake in the ground, when the accident happened.

Maclaren, Q. C., for the plaintiff.

Osler, Q. C., for the Grand Trunk R. W. Company.

Wallace Nesbitt and *MacMurchy*, for the Canadian Pacific Railway.

At the close of the evidence, the following judgment was delivered.

MEREDITH, C. J. :—

I do not think that I should allow this case to go to the jury.

Putting it upon the highest ground—that it was the duty of the defendants to provide reasonable facilities for those who were using the postal car for the purpose of posting letters while it was standing upon the track—and I think probably they were bound to do that—the case fails.

The company were not bound to, and did not provide facilities for persons mailing letters upon the train after it had started.

The plaintiff went down on this occasion and did not avail himself of the opportunity of mailing the letter while the car was standing. He chose, after the car had commenced to move, to go where the company had not invited him to go, and in consequence of what was there probably he fell and was injured.

No doubt this was a very serious accident—an unfortunate affair; but unless there was some duty upon these companies which they have failed to perform, the plaintiff cannot recover damages.

I think, therefore, that upon the plaintiff's case, I must dismiss the action. I will stay the proceedings for ten days to enable a motion to be made.

From this judgment the plaintiff appealed, to a Divisional Court, and the appeal was argued on March 5th, 1896, before ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ. Argument.

Maclaren, Q. C., for the plaintiff. Providing facilities for posting letters such as a letter slit in the door shews an invitation to the plaintiff to go there for that purpose. Did the starting of the train revoke that invitation? If the plaintiff was invited there the defendants are liable, unless he was guilty of negligence, and the trial Judge should have allowed the jury to pass upon that question: *Dublin, Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas., at p. 1167. It is not negligence to board a moving train: *Haldan v. The Great Western R. W. Co.*, at p. 94; *Johnson v. The West Chester & Philadelphia R. R. Co.*, 70 Pa. 357; *Swigert v. The Hannibal and St. Joseph R. W. Co.*, 75 Mo. 475. As to the duty of a railway company to friends of passengers I refer to *Watkins v. Great Western R. W. Co.*, 37 L. T. N. S. 193; and *Dublin, Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas., at p. 1155.

Osler, Q. C., for the Grand Trunk R. W. Co. The evidence shews the grossest negligence on the part of the plaintiff, and he will not swear he fell over the peg, which in any event was not in the station premises, but in the yard outside. There is no liability on the defendants. They are bound by statute to carry mails, and it is a Government service not under their control: The Railway Act, 51 Vict. ch. 29, sec. 264 (D.). The mail car may be defined as a post office by R. S. C. ch. 35, sec. 2, sub-sec. (l), but that is only in connection with duties of the officials, and in aid of the criminal law. I refer to *Jones v. The Grand Trunk R. W. Co.*, 16 A. R. 37; 18 S. C. R. 696.

Wallace Nesbitt and *MacMurchy*, for the Canadian Pacific R. W. Co. The plaintiff has not proved his case. He is not certain what he fell over: *Badgerow v. The Grand Trunk R. W. Co.*, 19 O. R. 191, and two cases there cited, *Hanson v. Lancashire and Yorkshire R. W. Co.*, 20 W. R.

Argument. 297, and *Gilbert v. North London R. W. Co.*, 1 Cab & El. 33. There was no invitation, and it was not railway business the plaintiff went there about, and there was no duty by the company to him: *Collis v. Selden*, L. R. 3 C. P. 495. The train moving was lawful, and was no fault of the defendants. The cause of the accident was the plaintiff's recklessness in running after a moving train and not the peg: *Jones v. The Grand Trunk R. W. Co.*, *supra*; *Dublin, Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas., at p. 1166; *Callender v. Carleton Iron Co. (Ltd.)*, 9 Times L. R. 646; *Headford v. The McClury Manufacturing Co.*, 24 S. C. R. 291.

Maclaren, Q. C., in reply.

March 16th, 1896. The judgment of the Court was delivered by

ARMOUR, C. J. :—

By the Railway Act 51 Vict. ch. 29, sec. 264, (D.), it is provided that "Her Majesty's Mail, * * shall, at all times, when required by the Postmaster General of Canada, * * and with the whole resources of the company if required, be carried on the railway, on such terms and conditions and under such regulations as the Governor in Council makes."

No evidence was given of what terms, conditions or regulations were made by the Governor in Council for the conveying of Her Majesty's mail by the defendant companies, but it was said by their counsel that the defendant companies respectively received so much a pound for the carriage of them.

It was shewn that the defendant companies respectively furnished special cars for the carrying of the mail, constructed according to designs prepared by the post office department, and the slits or openings therein for the purpose of posting letters, were so placed under the directions of that department.

On the 3rd May, 1895, the plaintiff went to the Union station for the purpose of posting a letter, and when he went there, a train of the defendants, the Canadian Pacific

Railway Company, which was to leave for Montreal at Judgment. 9 p. m., was standing on one of the tracks having a Armour, C.J. postal car thereon, but not being on the usual track, he did not recognize it, and stood talking with a friend on the platform, when it was pointed out to him by an hotel porter, and he at once started for the postal car to post his letter; and as he started, the train started too, and in following the moving train for the purpose of posting his letter on the postal car, he passed between the tracks to the eastward of the crossing,* of the tracks provided by the defendant companies, and in attempting to post his letter, he tripped and fell with his hand across the rail, and it was taken off by the moving train.

The defendant companies were at that time about to rearrange the platform of the shed from which this train started, and stakes had been driven in the ground for the purpose of enabling the workmen to get the proper line of the edge of the platform.

Three stakes stood up from the ground from two and a half inches to four inches high, and the plaintiff said that it was upon one of these stakes that he tripped; he could not swear positively to it, but he believed so, and said that there was nothing else upon which he could have tripped.

The evidence shewed that the public were in the habit of posting letters in these postal cars to the knowledge of the defendant companies.

The learned Judge dismissed the action, and a new trial is now moved for on the following grounds:

1st. That the evidence shewed that the defendants were guilty of negligence, which was the cause of the accident and of the injury to the plaintiff.

2nd. That it was proved that the plaintiff was lawfully on the defendants' premises for the purpose of mailing a letter on the postal car.

3rd. That the defendants owed a duty to the plaintiff in the premises and were guilty of negligence with respect

* A wooden crossing over all the tracks for foot passengers.

Judgment. to the stake or obstruction, which was the cause and occasion of the accident, and of the injury to the plaintiff.
Armour, C.J.

4th. That there was evidence of negligence on the part of the defendants which should have been submitted to the jury.

5th. That the trial Judge improperly excluded evidence of the practice or custom of mailing letters on postal cars even after the train had commenced to move.

I do not think that the plaintiff going upon the premises of the defendant companies for the sole purpose of posting a letter in the postal car of the train by which he was injured, can be said to have gone there upon business which concerned the defendant companies, and upon their invitation, express or implied, but he must be held to have gone there as a bare licensee.

The postal car was constructed to receive letters by persons desiring to post them, and was so constructed for the convenience of the public, and the invitation, if any, was the invitation of the post office department, and not the invitation of the defendant companies.

The plaintiff came upon the premises of the defendant companies simply for his own benefit, without any reciprocal advantage to them, and they could only be liable to him for something in the condition of the premises in the nature of a trap.

The law as to the duty owed by the occupiers of premises to a bare licensee, is thus laid down by Chief Baron Pigot, in *Sullivan v. Waters*, 14 Ir. C. L. Rep. 460: "A mere license, given by the owner, to enter and use premises which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, creates no obligation in the owner to guard the licensee against danger," at p. 475.

I refer also to *Gautret v. Egerton*, L. R. 2 C. P. 371; *Ivay v. Hedges*, 9 Q. B. D. 80; *Batchelor v. Fortescue*, 11 Q. B. D. 474.

The motion must be dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

JARVIS V. FLEMING.

Municipal Corporations—Expenditure of Public Money—Contribution to Costs of Private Action—Injunction.

A ratepayer having brought an action against a gas company on behalf of himself and all other consumers of gas for an account of moneys alleged to have been improperly obtained in the past from gas consumers and with the intent of reducing the price of gas to them, the defendants' executive committee reported in favour of authorizing the city council to grant money to carry on the action :—

Held, that the plaintiff was entitled to an injunction to restrain any such payment by the defendants, the same being without consideration and not in pursuance of any prior agreement or understanding.

THIS action was brought by a ratepayer on behalf of himself and all other ratepayers of the city of Toronto, to restrain the mayor, treasurer and corporation of the city from paying the sum of \$1,500 to one Johnston to reimburse him the costs incurred by him in a suit brought by him on behalf of the consumers of gas against the Consumers' Gas Company. Statement.

The action of *Johnston v. Consumers' Gas Co.*, 27 O. R. 9, was brought to have it declared that certain moneys which the defendants should have applied in a particular manner with the result of reducing the price of gas to consumers in accordance with the provisions of their Act of Incorporation had been applied to other purposes; and for an account of the moneys improperly obtained in the past from the consumers of gas by reason of such breach of duty. That action was not instituted by the city nor with its authority, nor did it ever agree to become in any way liable for the costs of it. The plaintiff in that action took the case down to trial and obtained a judgment in his favour, on September 9th, 1895; the defendants the Consumers' Gas Company appealed from the judgment to the Court of Appeal; the appeal had been argued and was standing for judgment.

On February 5th, 1896, the Executive Committee of the city council brought in a report, in which they recom-

Statement. mend, amongst other things, that legislation be applied for "to authorize the council to grant moneys to carry on the action of *Johnston v. The Consumers' Gas Co.*, and any other actions which may be brought by ratepayers against companies or individuals where the corporation is interested or could have brought such action."

In the same report they recommend that "Mr. J. T. Johnston be paid the sum of \$1,500, costs incurred in above suit, on his giving a bond to the city to refund same or any portion thereof which he may collect from the Consumers' Gas Company, and to refund the whole of said sum if it is shewn at any future time that the corporation had not authority to make such payment to him."

On February 13th, 1896, an *ex parte* injunction was granted until February 18th, 1896, by Mr. Justice FALCONBRIDGE, restraining the defendants in the present action from paying over to J. T. Johnston any moneys to defray the expenses of his action against the Gas Company.

On February 14th, 1896, the defendants moved by special leave "to dispose of the injunction," and the question was raised as to whether the injunction should be dissolved or should be continued to the hearing of the cause. Upon the motion it was sworn that Johnston, to whom it is proposed to pay the money, was worth \$20,000, and was in perfectly solvent circumstances, and that he was willing to enter into a bond to repay the money according to the resolution of the Executive Committee.

It was also stated by the mayor in his affidavit that the city was a large consumer of gas and interested largely in the success of the action brought by Johnston; he stated further that Johnston had agreed with the city that he would not compromise or abandon his action without the consent of the city. This was explained by counsel as being a verbal arrangement between Johnston and the mayor. It appeared also that upon one of the arguments of the case counsel paid by the city had appeared with

those employed by Johnston, and had taken part on his behalf in the argument. **Statement.**

Christopher Robinson, Q. C., and John McGregor, appeared on the motion for the defendants, and cited Brice on Ultra Vires, 3rd ed., p. 446, sec. 2; Baker v. The Inhabitants of Windham, 13 Me. 74; Morawetz on Private Corporations, 2nd ed., vol. 1, sec. 430; Babbitt v. The Selectmen of Savoy, 3 Cush. 530; Holdsworth v. Mayor, etc., of Dartmouth, 11 A. & E. 490; Smith v. Doyle, 4 A. R. 471; Davies v. The City of Toronto, 15 O. R. 33; Attorney-General v. Mayor, etc., of Norwich, 2 M. & Cr. 406; Dillon on Municipal Corporations, 4th ed., pp. 151, 218-21; 50 Vict. ch. 85 (O.).

Shepley, Q. C., and Lobb, for the plaintiff, cited Dillon, ib., secs. 917, 919; City of New London v. Brainard, 22 Conn. 552; Withington v. The Inhabitants of Harbord, 8 Cush. 66; Drake v. Phillips, 40 Ill. 388; Smith v. The Corporation of the Township of Raleigh, 3 O. R. 405; Wallace v. The Corporation of the Town of Orangeville, 5 O. R. 37; Wilkie v. The Corporation of the Village of Clinton, 18 Gr. 557.

Robinson, in reply, cited Mann v. Edinburgh Northern Tramway Co., [1893] A. C. 69.

February 18th, 1896. STREET, J., (after stating the facts as above) :—

The question before me upon the affidavits filed is presented in the simplest possible form. Some two years ago Mr. Johnston, who is a ratepayer in Toronto but is not an officer of the corporation, brought an action in his own name on behalf of all the gas consumers of the city. The object of the action was of interest to all gas consumers, including the city corporation; but Mr. Johnston brought and has carried on the action down to the present time entirely upon his own responsibility and by his own solicitor, and the city council did not direct the action to be brought, did not join in it as parties, and has never under-

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Street, J.

taken any responsibility for the bringing of it or for the costs incurred in it. The plaintiff has obtained judgment in his favour, and the defendants the Gas Company have appealed to the Court of Appeal, where the appeal has been argued and now stands for judgment. Under these circumstances, can the city council lawfully make a grant of \$1,500 to Mr. Johnston for the purpose of reimbursing to him the costs which he has incurred in the prosecution of the action?

I am of opinion that it cannot do so for the reason that, as the facts appear before me, the grant of the money means simply the giving away to Mr. Johnston of \$1,500 of the money of the city; there is no liability to him on the part of the city at all, and the city after paying it will stand in no better position with regard to its rights against the Gas Company than it did before doing so. I can find no consideration for the payment of the money, and there is no authority, express or implied, in the Municipal Act (which is their guide) authorizing the council to make a gift of money under such circumstances.

It was pointed out on behalf of the defendants that the city council had paid their own counsel to appear upon one of the arguments in the case to uphold the contentions of the plaintiff Johnston. That is, no doubt, true; but their liability for doing so began and ended with the payment to the counsel employed by them, and it is not alleged that any further liability was undertaken or stipulated for. On the contrary, it is to be assumed that by reason of their having done so the expense incurred by the plaintiff was to some extent lightened.

Then it was urged that it appears from the mayor's affidavit that Mr. Johnston had agreed not to compromise the action without the consent of the city. It is not stated when or how this agreement was arrived at, and it does not appear that the proposed grant of \$1,500 has anything to do with the agreement. But even if Mr. Johnston had said to the mayor or had agreed with the city that if the \$1,500 were paid him he would not compromise the action

without the consent of the city, the city would be in no better or stronger position after than before such agreement. The rights of all the members of the class on behalf of whom the action was brought were fixed (subject, of course, to the right of appeal of the defendants the Gas Company) by the judgment in the plaintiff's favour on September 9th, 1895. After that judgment the plaintiff could only act for himself in compromising the action; if he chose to compromise for himself he could do so, but the corporation of Toronto as a member of the class, or any other member of it, might then proceed under the judgment and prosecute it in his place with the leave of the Court: *Handford v. Storie*, 2 S. & S. 196.

Judgment.
Street, J.

The stipulations proposed by the Executive Committee's resolution do not help the matter. They propose to take a bond from Mr. Johnston that he will repay the money or such portion of it as he may recover from the Gas Company. This means that if the action should be finally decided against the plaintiff, so that neither he nor the city nor any other gas consumer obtains any benefit from it, the city will have paid to Mr. Johnston the costs which he has incurred in an abortive attempt to lower the price of gas. If he had instituted the action upon a promise on the part of the city corporation to indemnify him, it may well be that such a promise would, under the circumstances, have been within their powers, and no one would dispute that it would be simple justice to make it good; but voluntarily to pay him, after the litigation, the costs which he has incurred, without any obligation to do so, would be an act which, if done by an individual, would be one of simple generosity, and which a municipal council, in my opinion, has no authority to do: *Dillon on Corporations*, 4th ed., secs. 89, 147 (a); *Regina v. Lichfield*, 4 Q. B. 893; *Kernaghan v. Williams*, L. R. 6 Eq. 228.

The injunction should, therefore, be continued to the hearing, and the costs will be dealt with there unless otherwise ordered.

A. H. F. L.

REGINA EX REL. HARDING V. BENNETT.

Municipal Corporations—Municipal Elections—Disqualification—Exemption Without Contract—Property Qualification—55 Vict. ch. 42, sec. 73, 86—56 Vict. ch. 35 (O.), sec. 4.

In 1892 a city council passed a by-law exempting the property of the partnership of the respondent, who had been elected alderman, from taxation except as to school rates, for a period of seven years :—

Held, that the exemption, not being founded upon any contract but being an exemption without a contract, as provided for by 56 Vict. ch. 35, sec. 4 (O.), there was no disqualification.

Regina ex rel. Lee v. Gilmour, 8 P. R. 514, distinguished.

Held, also, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property, the four partners being rated for this property as freeholders to the amount of \$10,000 : 55 Vict. ch. 42 (O.), sub-secs. 73 and 86.

The words "exempt from taxation" in 56 Vict. ch. 35, sec. 4, mean exempt from payment of all taxes, including school rates.

Statement. THIS was a motion in the nature of a *quo warranto* to unseat Robert W. Bennett, who had been declared elected to the office of alderman for the city of London.

The motion was argued in Chambers on February 14th, 1896. The facts are fully stated in the judgment.

Hellmuth, for the relator, cited *Regina ex rel. Lee v. Gilmour*, 8 P. R. 514 ; *Regina ex rel. McGuire v. Birkett*, 21 O. R. 162 ; *Regina ex rel. Clancy v. McIntosh*, 46 U. C. R. 98.

Moss, Q. C., for the respondent.

February 20th, 1896. STREET, J. :—

The grounds upon which the respondent's right to hold the office to which he has been elected is attacked, are two: 1. That he is disqualified by reason of his having an interest in a contract with the corporation; and 2. That he did not possess the requisite property qualification at the time of the election.

The grounds upon which it was contended that the

respondent was disqualified, are these. During the year 1892, he and one Thomas D. Hodgins carried on business as partners in the manufacture of certain articles of school and other furniture in the fifth ward of the city of London, under the name of the Bennett Furnishing Company. In October, 1892, the respondent agreed to buy out the interest of Hodgins in the property of the firm, but Hodgins retained an interest in the property to secure certain moneys due him. Under a former by-law the property upon which the firm had its works, had been exempt from taxation, and in December, 1892, Hodgins and the respondent joined in an application to renew the exemption.

Judgment.
Street, J.

Thereupon the city council on December 19th, 1892, by the proper two-thirds majority, passed a by-law No. 709, with no other recital than that they had by a two-thirds vote of all their members, decided to exempt "the Bennett Manufacturing Company, Limited," from taxation, as thereafter provided. This by-law then went on to enact that so long during seven years from January 1st, 1892, as "the Bennett Manufacturing Company, Limited," should employ a certain number of men, keep their establishment in active operation, etc., "the manufacturing establishment of the said company be, and the same is hereby exempt from taxation, except as to school rates."

There was in fact no such company in existence as "the Bennett Manufacturing Company, Limited;" but the Bennett Furnishing Company—the partnership between the respondent and Hodgins—is styled in one place, in their agreement of October, 1892, to dissolve it, "the Bennett Manufacturing Company." Furthermore, there had formerly been in existence, carrying on business upon the same premises, an incorporated company called "the Bennett Furnishing Company, Limited," to which an exemption from taxation for ten years had been granted in 1881; this company is referred to in 48 Vict. ch. 63, sec. 18 (O.), as "the Bennett Manufacturing Company, Limited." So that it is plain that a good deal of confusion had existed with regard to the precise name of the com-

Judgment.
Street, J.

pany. There is not, however, a shadow of doubt that when the city council passed their by-law on December 19th, 1892, there was only one company to which it could apply, and that was the partnership properly known as the Bennett Furnishing Company, carried on by the respondent.

The respondent in the fourth paragraph of his affidavit, filed on this motion, says that the word "Manufacturing," in the style of the company to which the exemption was granted, was by mistake used instead of "Furnishing." It is also shewn that the Bennett Furnishing Company now is a partnership carried on by the respondent and his three brothers, and that they have enjoyed and taken advantage of the exemption granted by the by-law of December, 1892.

I think, therefore, that I must hold that the respondent is a member of a firm whose property is exempt from all taxes but school rates. The relator contends upon this state of facts, relying on *Regina ex rel. Lee v. Gilmour*, 8 P. R. 514, that this by-law creates or evidences a contract between the respondent and the city, and that he is thereby disqualified.

The present case is, however, plainly distinguishable from the one relied on in this vital respect; in that case a contract was actually recited in the by-law, the provisions of which are founded upon the contract; while in the present case, there is no evidence either in the by-law or external to it to shew that any contract existed. The by-law simply grants the exemption so long as the company shall employ a certain number of hands.

The distinction between an exemption founded upon a contract, and an exemption without a contract, seems to be provided for in the amendment to section 77 of the Municipal Act of 1892, enacted by section 4 of 56 Vict. ch. 35.

In my opinion there was an exemption here, but no contract, and so there is no disqualification.

The second question is, whether the respondent had a sufficient qualification.

In my opinion he was entitled to qualify upon his rating upon the assessment roll of 1895, as a joint owner of a freehold estate in the partnership property of the Bennett Furnishing Company. The respondent and his three partners are rated for this property as free-holders to the amount of \$10,000. Under section 86 of the Municipal Act, 55 Vict. ch. 42 (O.), it is provided that "where real property is owned or occupied jointly by two or more persons, and is rated at an amount sufficient if equally divided between them, to give a qualification to each, then each shall be deemed rated within this Act;" and it was held by the late Chief Justice Draper as far back as 1861, upon the same section, that the qualification intended by it was not confined to that of "electors," the heading under which the section appeared, and still appears, but extended to all cases of rating under the Act, and included the qualification to be elected as well as to elect: *Regina ex rel. McGregor v. Ker*, 7 U. C. L. J. O. S. 67.

Judgment.
Street, J.

The respondent's one-fourth share of the sum at which this real estate is assessed, is \$2,500, and the property is sworn to be free from all encumbrances; so that unless there is something in the statutes preventing him for using this assessment as a qualification, it is clearly sufficient.

Section 73 of the Municipal Act of 1892, 55 Vict. ch. 42, (O.), provides that no person shall be qualified to be elected an alderman unless he or his wife has, at the time of the election, as proprietor or tenant, freehold or leasehold property rated in his own name, or in the name of his wife, on the last revised assessment roll, to at least the value following: freehold to \$1,000; or leasehold to \$2,000. If this clause stood without any thing to qualify it, I think that the respondent's assessment and rating for his share of the manufacturing property would be clearly sufficient to qualify him, because notwithstanding the by-law of December, 1892, and in fact under its very terms the Bennett Company remained liable to pay school rates, and those school rates by section 110 of the Public Schools Act of 1891, 54 Vict. ch. 55, (O.), must be levied by the city upon the taxable pro-

Judgment.
Street, J.

perty of the municipality ; and by section 4 of 55 Vict. ch. 60, the city cannot exempt any part of the ratable property in the municipality from payment of them. The respondent and his partners were, therefore, properly and necessarily rated upon the assessment roll for this property for the school rates, though not for municipal rates, and so came in regard to it within section 73 of the Municipal Act, which declares the qualification necessary in the case of aldermen, to be a rating to the extent of \$1,000 upon the last revised assessment roll.

In 1893, however, the Legislature by 56 Vict. ch. 35, sec. 4, added to the 77th clause of the Municipal Act, which deals with the disqualification of members of councils, the following provision : " Provided that no person shall be disqualified from being elected a member of any municipal council by reason only that a part of his property is exempt from taxation, if such person is assessed for sufficient other property in the municipality liable to taxation to qualify him for such office," etc., etc.

The question is, whether under this language, taken along with the provisions of section 73, the respondent is debarred from qualifying upon his share in the partnership land, because of the by-law exempting it from the taxes other than school taxes.

I think this clause does not affect the present case at all, because the respondent does not appear to have any property which is " exempt from taxation," by which must be meant exempt from payment of all taxes.

There are numerous persons to whom the clause applies, because in by-laws passed before 1892, the municipal councils might exempt manufacturers and others from payment of all taxes whatever. Where this was the case, the exempted property was not assessed for any taxes at all, and no person was rated upon the assessment roll in respect of it. But wherever a property is only exempt from a portion of the taxes, then it must appear upon the assessment roll, and the owner must be rated in respect of it for the taxes from which he is not exempted, such

property is "liable to taxation," and the owner can qualify upon it. Judgment.
Street, J.

With regard to the other properties upon which it was argued that the respondent could qualify, I think that his contention must have failed. The house and lot on Queen's avenue are assessed together at \$2,000; and on the day of nomination there was a mortgage for \$2,000 upon it, which was mysteriously reduced to \$1,500 by a payment of \$500, made by some person or persons unknown to the respondent and without his knowledge or request, in order that with the assistance of a surplus over incumbrances of \$600 upon another lot of land, he might qualify. But the generous act of this unknown friend, is rendered useless for the purpose for which it was intended, owing to the inability of the respondent to establish when it was done; and as it is shewn that down to the nomination day, there was an incumbrance for the full assessed value of the property, I must assume it to have continued until some date is fixed at which it was reduced.

The encumbrance must be deducted from the assessed value, and the surplus only counted for the purpose of a qualification unless the property is in the "actual occupation" at the time of the election of the person seeking to qualify upon it.* The house upon the property in question was, at the time of election, under lease to a tenant, who was in "actual occupation" of it; and the fact that the respondent had some fertilizer for an intended garden lying on the back part of the lot which had been assessed along with the front part, does not bring the respondent within the description of an "actual occupant" of the whole lot, which he must be before the encumbrance can be withdrawn from consideration.

I think, however, for the reasons I have given, that the other qualification was sufficient, and the motion must, therefore, be dismissed with costs, including the costs of the examinations and cross-examinations.

A. H. F. L.

* 55 Vict ch. 42, sec. 73 (O).—REP.

[CHANCERY DIVISION.]

PRIDE V. RODGER.

Crown Lands—Locatee—Partition—Jurisdiction—Declaratory Relief—Statute of Limitations—Judicature Act—R. S. O. ch. 44, sec. 21, sub-sec. 7.

A locatee of Crown lands left the Province in 1868, and was last heard of in 1877. The defendant, a son of his, had resided continuously on the property since 1881, cultivating and improving it, and the plaintiff, a daughter, resided on it also, from time to time, till 1887. There were two other children who had not been in possession of the land for more than ten years before action, which was brought in 1895 :—

Held, that the locatee must be presumed to have been dead by 1884, and the defendant had acquired a title by possession as against the children other than the plaintiff, whose claim as to one-quarter was as good as his, and in making partition the Crown should recognize his right to the improvements.

The Statute of Limitations, R. S. O. ch. 111, applied because the rights involved upon the record were merely private rights not affecting the pleasure or the sovereignty of the Crown.

Even in the case of unpatented lands, declaratory relief may in a suitable case be given, which will work practically the result of a partition of the property, subject to the Crown being willing to act upon the judgment of the Court.

Statement. THIS was an action brought by Janet Pride, who was a sister of Andrew Rodger, against him and two other children of one John Rodger, deceased, and the widow of the said John Rodger, for a declaration that John Rodger died intestate before July 1st, 1886, and for the partition or sale of certain unpatented lands in the county of Grey, of which John Rodger had been locatee, and that the judgment should be so framed as to provide, if necessary, for paying the claim of the Crown and the issue of a patent before such partition or sale.

The circumstances of the case are fully stated in the judgment.

The action was tried before FALCONBRIDGE, J., at the non-jury sittings at Guelph, on November 12th, 1895.

November 14th, 1895. FALCONBRIDGE, J. :—

John Rodger (called in the pleadings Rogers) went away in 1868, leaving on the farm in Protqn, of which he was

locatee, his wife and five children, of whom one died intes- Judgment.
tate; his wife and the other children are parties to this Falconbridge,
action. He has never been heard from since, and it does J.
not appear that he has ever been certainly heard of. An
acquaintance reported to Rutherford Rodger (a brother), in
1878, that in 1877 he heard of a man of the name at
Ballarat, Australia, but had not seen him as the man was
away from home.

There were circumstances about John Rodger's departure which might render it improbable that he would communicate with his friends and relatives—at any rate with his wife, with whom he had not agreed; but I take it that the increased and increasing facilities of travel and of communication, rendering it daily so much more difficult for a man to hide himself in any part of the civilized globe, will gradually limit the application of the rule laid down by Sir John Stuart, V. C., in *Bowden v. Henderson*, 2 Sm. & G. 360.

Assuming that the man heard of in Australia in 1877, and reported in 1878, was the John Rodger in question, I find that the said John Rodger was dead on the 1st day of January, 1886.

There is no presumption and therefore no declaration as to the time of his death, and it is not material in this case.

I find the issue joined on the defence by Andrew and Ellen of the Statute of Limitations against these defendants.

I find that the selling value of the property has been enhanced by the improvements made by Andrew to the extent of \$800, and I charge him \$400 occupation rent.

There will be a decree for partition and sale, but I think that the parties on the basis of the above findings can by agreement avoid a reference.

If there must be a reference it will be to the Master in the county of Grey where deceased resided and the land is situate.

There will be a lien on the lands in favour of any party advancing money to pay the balance still due to the Crown.

Costs to all parties out of the estate.

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Argument. The defendants Andrew Rodger and Ellen Rodger moved in the Chancery Divisional Court by way of appeal from the above judgment.

The motion was argued before BOYD, C., and ROBERTSON, J., on December 19th, 1895.

W. H. Blake, for the motion. We had acquired title by length of possession: *Hickman v. Upsall*, 4 Ch. D. 144; *In re Rhodes, Rhodes v. Rhodes*, 36 Ch. D. 586. But partition cannot be made of unpatented lands: *Holmsted & Langton's Judicature Act*, p. 779; *Cuthbert v. Cuthbert*, 11 Gr. 88; *Abell v. Weir*, 24 Gr. 464; *Jenkins v. Martin*, 20 Gr. 613; R. S. O. ch. 24, sec. 21.

[BOYD, C., referred to *Bull v. Frank*, 12 Gr. 81.]

Kingstone, Q. C., for the plaintiff. The Statute of Limitations has no application, the fee being in the Crown: *McLure v. Black*, 20 O. R. 70; *Jamieson v. Harker*, 18 U. C. R. 590; *Dowsell v. Cox*, *ib.* 594; *Day v. Day*, 17 A. R. 157. The defendant Andrew has not acquired title by possession. See, also, *Yale v. Tollerton*, 13 Gr. 302, followed in *Ferguson v. Ferguson*, 16 Gr. 309; R. S. O. ch. 27, sec. 21. We could not satisfactorily have gone to the Crown Lands Department. They have no jurisdiction in such a case as this to decide whether the original locatee is dead or not, where there is, as here, no direct evidence of death.

Blake, in reply. The question of the Statute of Limitations in the form it is raised here has never come up in a reported case. *McLure v. Black*, we would cite as in our favour. This is such a case as BOYD, C., foreshadowed in his judgment in that case.

February 26th, 1896. The judgment of the Court was delivered by

BOYD, C.:—

The land in question is held by the Crown under location to John Rodger. He went away from the Province in 1868, leaving a widow and four children, yet living, and since then nothing has been heard from him except a

report, which may be accepted as credible, that he was seen in the gold fields of Australia in 1877. The trial Judge finds that he died or was dead on January 1st, 1886, and directs partition among the children. It is objected that partition does not lie in the case of Crown lands, and, if it does, it is further urged that, applying the seven years' rule as to absentees, the finding should have been that the locatee died seven years after 1877, *i.e.*, in 1884, and that as the action was not begun till June, 1895, there was adverse or exclusive possession of the estate by the son Andrew, which, under the Statute of Limitations, should divest or extinguish the claim of the other children not in possession.

Judgment.

Boyd, C.

First, as to jurisdiction: it is true in terms that when the fee is in the Crown partition is not the proper form of relief. Yet there is jurisdiction to "decree the issue of letters patent from the Crown to rightful claimants": Judicature Act, R. S. O. ch. 44, sec. 21 (7); and in pursuance of that power, declaratory relief may in a suitable case be given which will work practically the result of a partition of the property—if the Crown is willing to act upon the judgment of the Court.

I say a "suitable case," for it is not in every case of a deceased locatee that the Court will entertain jurisdiction. The limits of curial action are to some extent indicated in the judgment of Mowat, V.-C., in *Bull v. Frank*, 12 Gr. 81; but in the present action, though no special ground is laid for interference, yet, as both parties put themselves upon the Court—the defendant asking terms favourable to his contention—and as the whole case has been investigated without this preliminary objection being raised till the appeal stage is reached, I am against turning the case round for want of jurisdiction.

The rights of the plaintiff depend upon the applicability of the Statute of Limitations to this case. I do not see why it should not apply in favour of him in possession as against those who have been out of possession. The rights involved are upon this record merely private rights not

Judgment.

Boyd, C.

affecting the pleasure or the sovereignty of the Crown. As said by Blackburn, J., in *Rustomjee v. The Queen*, 1 Q. B. D., at p. 491 :—"The Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it." That the statute may run in such a case as this appears to be involved in the language used by the Court of Appeal in *Watson v. Lindsay*, 6 A. R., at p. 618. See, also, per Story, J., in *Thomas v. Hatch*, 3 Sum. C. C., at p. 182.

On the evidence the father was last heard of in 1877 ; by the application of the seven years of absence doctrine the presumption of his death will arise in 1884. From that date the Statute of Limitations will run against the children out of possession. The son remained there since 1881, continuously cultivating and improving the property ; one sister, Violet, married and left the place nineteen years ago ; another, Mary, did the same twelve years ago ; but the plaintiff was there " off and on " till February, 1887, when she too married and went away.

According to the evidence, she was six weeks continuously living at home, on the place, before her marriage. The action was begun in June, 1895, which is within ten years from her last residence on the place, so that I think her claim to one-fourth is good as against the defendant Andrew, the son. In making partition the Crown should recognize the right of the son to the improvements. Meanwhile all the Court should do is to declare that the son Andrew is entitled to three-fourths of the land (with all improvements) located to and by his father, and that the plaintiff is entitled to one-fourth thereof, on contributing one-fourth of balance of price. No costs of action or appeal. Even if the dates are taken as set forth in the pleadings of the plaintiff that the father went away in 1868 and was not afterwards heard of or from, the result would be the same. The death of the father would then be imputed in the year 1875. But the mother was then and thereafter in possession, exercising ownership till the year 1881, when the defendant, who had been working out for

ten years, came upon the place and worked and cleared and improved it continuously till the present time. As to time, the statute would begin in 1881: but the plaintiff was a member of the household off and on until her marriage in 1887, and would have ten years from that date before her claim would be barred.

Judgment.
Boyd, C.

A. H. F. L.

[CHANCERY DIVISION.]

ROSE V. MCLEAN PUBLISHING COMPANY.

*Trade Name—Geographical Designation—"The Canadian Bookseller"—
"The Canada Bookseller and Stationer"—Injunction.*

As a rule a man cannot have monopoly or property in a geographical name.

The plaintiff having published for a number of years a journal devoted to the interest of the booksellers in Canada, called "The Canadian Bookseller," sought to enjoin the defendants from adopting as the name of a journal published and sold by them, "The Canada Bookseller and Stationer," which for many years had been published by them under another name. There was no evidence of fraudulent intention on defendant's part:—

Held, that the plaintiff was not entitled to the injunction sought for.
Decision of MACMAHON, J., reversed.

THE plaintiff, who was a publisher carrying on business in Toronto, and who, as he alleged in his statement of claim, had been for more than eight years prior to the commencement of this action publishing periodically a monthly journal devoted to the interest of booksellers, stationers, and libraries, and known by the name of "The Canadian Bookseller and Library Journal" which had been well known and established as a Canadian publication under that name, and especially under the name of "The Canadian Bookseller," for many years, brought this action for an injunction to restrain the defendants from continuing to publish any publication under the name of "The Canada Bookseller" or any other name likely to be confounded with the name of the plaintiff's publication, and for damages.

Statement.

Statement. In their statement of defence the defendants alleged among other things that the word "Bookseller" was for many years prior to the plaintiff's publication, and had continued to be and still was used as the name or the distinctive prominent and important part of the name of trade journals and periodicals in circulation throughout Canada, and the city of Toronto, and was in common use in such connection: that the name "Canada Bookseller and Stationer" was adopted by them as publishers of trade journals, so that the name would indicate to its patrons and the public generally the trade in the interests of which it was published, and it was adopted in good faith and without any improper motive.

The action was tried at Toronto, on October 28th, 1895, before Mr. Justice MacMahon.

Kappele, for the plaintiff.

LeVesconte, for the defendants.

MACMAHON, J. :—

The plaintiff was publishing a journal devoted to the interest of the booksellers in Canada, which was commenced a little over seven years ago, called the "Canadian Bookseller." Up to the month of March last the defendants were publishing a journal called "Books and Notions," which had been about eleven years in existence. Some short time prior to March last they desired to change the name of their journal, and after communicating with their friends as to what would be an appropriate name, concluded to change the name to "The Canada Bookseller and Stationer." Immediately on the first number appearing with that name, the defendants were notified that the plaintiff objected to its use as being an infringement on his rights under the journal he had been publishing as "The Canadian Bookseller." The defendants have gone on publishing since under the name they

had adopted ; and the question I have to decide is, whether they have taken a part of the title acquired by the plaintiff under the name of "The Canadian Bookseller," and are making use of it as against the right so acquired.

Judgment.
MacMahon,
J.

Both the journals are published in the interest of the trade. Even the witnesses called by the defendants say it is in the interest of the trade they are published.

The evidence before me makes it quite clear that, to those who are not in the constant habit of seeing the two journals, and paying particular attention to the two titles, there is much difficulty in distinguishing between them. Mr. Brown, who has been connected with a book and publishing business for some years, said that on one occasion, after the defendants had changed the name from "Books and Notions" to "The Canada Bookseller and Stationer," he had furnished them with some information ; that although at the time he furnished the information he took both publications, he did not know exactly the name of the journal to which it was furnished, although he intended, as he said, to furnish it to the journal published by the defendants ; but he stated that if he were called upon, without looking at the journals themselves, to say which was published by the defendants, whether "The Canadian Bookseller" or "The Canada Bookseller and Stationer," he could not for the moment have told. And a witness on behalf of the defendants—Mr. Hornibrook—says, that to one who is not familiar with both publications, they might easily be mistaken. In fact that is the testimony of a good many witnesses who were called during the trial.

The legal question which has been raised by Mr. LeVesconte, I will consider after examining the authorities he has cited, and which I have not had an opportunity of seeing.

[Afterwards, on November 9th, 1895, his Lordship gave judgment as follows :—]

Since the trial I have had an opportunity of examining the authorities.

Mr. LeVesconte urged that because no fraud was shewn

Judgment. in using the name they did, they, the defendants, should
MacMahon, J. not be restrained. A like ground was urged in *Clement v. Maddick*, 1 Giff. 98, which was thus met by Stuart, V. C. : " This is an application in support of the right to property. It has been argued on behalf of the defendants that unless a fraudulent intention is made out, the plaintiffs are not entitled to an injunction. * * * The defendants' whole case appears to rest on the fact that they intended to commit no fraud ; that they had no fraudulent intention in adopting the words ' Bell's Life,' and thought that by prefixing the word ' Penny' to the title, they had sufficiently warned the public that they were not purchasing the plaintiffs' paper. But the absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured."

The plaintiff proved a circulation of from 800 to 1,400 copies of his journal and that he was paid for most of the advertising appearing therein, and that his journal circulated in the trade and was sent to the libraries.

In addition to the evidence already referred to as shewing that the name adopted by the defendants is so like the plaintiff's that it is not easily distinguished from it, there is the fact that letters intended for the defendants were by reason of the similarity of the names of the two publications delivered by the post office officials to the plaintiff.

There is, therefore, every probability of the plaintiff being injured by the public being deceived and in order to protect the plaintiff's rights of property in the name of his journal, he is, I consider, entitled to an injunction restraining the defendants from using the word " Canada " or " Canadian " in conjunction with the word " Bookseller " in his publication.

I refer to the following cases where injunctions were granted : *Prowett v. Mortimer*, 2 Jur. N. S. 414, where the proprietors of the newspaper " The John Bull and Britannia," were held entitled to restrain the proprietors of " The True Britannia " ; *Ingram v. Stiff*, 5 Jur. N. S. 947, " The

London Journal" restrained "The London Daily Journal"; *Judgment.*
Corns v. Griffiths, W. N. 1873, p. 93 (the facts not being *MacMahon,*
 unlike those disclosed in the present case), where proprietors of "The Iron Trade Circular—Rylands," were held J.
 entitled to an injunction restraining a publication called
 "The Iron Trade Circular, edited by Samuel Griffith." So
 in the *American Grocer Publishing Association v. The*
Grocer Publishing Co., 32 N. Y. (Hun) 398, it was held
 that the plaintiff was entitled to an injunction restraining
 the defendant from the publication of any paper called the
 "Grocer," or the "American Grocer," as it had acquired a prop-
 rietary right to that name. See also other cases where
 injunctions granted cited in *Sebastian on Trade Marks*,
 2nd ed., pp. 320-1.

Dale v. Smith, W. N. 1882, p. 145, makes against instead
 of being an authority in favour of the defendants here.
 The defendants in that case had been publishing a jour-
 nal under a name colourably differing from that of the
 plaintiff's journal; but a few days after the motion for an
 injunction was made (which motion was ordered to stand
 over till the trial), the defendants notified the plaintiffs
 that they would not publish a journal under that title
 thereafter; and it was held by the Court of Appeal that
 after such notice, the plaintiffs were not entitled to an
 injunction. See the opinion of Lord Coleridge, C. J., in
Borthwick v. The Evening Post, 37 Ch. D., at p. 458; and
 also *Merchants Banking Co. of London v. Merchants*
Joint Stock Bank, 9 Ch. D. 560.

The plaintiff is entitled to an injunction restraining the
 defendants from using the word "Canada" or "Canadian"
 conjointly with the word "Bookseller" as a title of their
 journal.

The defendants must pay the plaintiff's costs of suit.

If the plaintiff desires a reference as to damages the
 reference will be to the Master.

The defendants moved before the Divisional Court of
 the Chancery Division by way of appeal from the above

Argument. judgment upon the ground among others that the words "Canada" or "Canadian" cannot be monopolized by any one to the exclusion of others; that the plaintiff had no exclusive proprietary right to the use of the name which he had adopted for his publication, and that the name adopted by the defendants for their journal was one which was truly descriptive and truly and correctly set forth the business in the interests of which their journal was published.

The motion was argued on December 17th, 1895, before BOYD, C., and ROBERTSON, J.

C. Robinson, Q. C., for the defendants. There is no charge and certainly no evidence of fraud: *Thompson v. Montgomery, In re Joule's Trade Marks*, 41 Ch. D. 35. If we may call our publication "The Bookseller," can we not call it "The Canadian Bookseller?" There is no evidence that we intended to pass off our journal as theirs, unless it is assumed from the similarity of name: *Reddaway v. Banham*, [1895] 1 Q. B. 286.—[BOYD, C., referred to *Robinson v. Bogle*, 18 O. R. 387.]—What is descriptive is common to the world. So long as the name is a true description of the article, you cannot be prevented from using it: *Canal Co. v. Clarke*, 13 Wall. 311; *Borthwick v. The Evening Post*, 37 Ch. D. 449; *Robinson v. Bogle*, 18 O. R. 387. Many of the cases turn upon fraud—the presence of deliberate, intentional fraud: *American Grocer Publishing Association v. The Grocer Publishing Co.*, 32 N. Y. (Hun) 398; *Hendriks v. Montagu*, 17 Ch. D. 638; *Merchants Banking Co. of London v. Merchants Joint Stock Bank*, 9 Ch. D. 560; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *The Free Fishers and Dredgers of Whitstable v. Elliott*, 4 Times L. R. 273; *Koehler v. Sanders*, 55 N. Y. (Hun) 48; *Bradbury v. Beeton*, 39 L. J. Ch. 57; *Bell v. Locke*, 8 Paige (Ch. R.) 74; *Duniway Publishing Co. v. The North-West Printing and Publishing Co.*, 11 Oreg. 322. This case fails (1) because "Canada" is simply descriptive of country; (2) "bookseller" is simi-

larly simply descriptive of business carried on in it ; (3) **Argument.** the plaintiff admits he has suffered nothing.

Le Vesconte, on same side. We have an office in New York and in London, England, as well as here. The word "Dominion" would not indicate abroad what country was meant. We publish our name on our book, and refer to our Montreal and Toronto offices.

Kappele & Bicknell, for the plaintiff. Trade issues and trade marks are two different things. The point is, have the plaintiffs acquired by user a right to the name as descriptive of the journal they are publishing? Whether there were "Booksellers" in other countries or not makes no difference, for trade names are territorial. The question was one of title acquired by user. The defendants are likely to get advertisements sent to "The Canada Bookseller" and intended for us.

Robinson, in reply. No doubt so long as the plaintiff alone was publishing the paper the name was identified with him.

February 26th, 1896. The judgment of the Court was delivered by

BOYD, C. :—

The appeal in this case is against the judgment which forbids the defendant to use "Canada" or "Canadian" in conjunction with the word "Bookseller," as a title of the journal published by the defendants. The plaintiff's paper is called "The Canadian Bookseller," and this his company has published for some seven years. The "get-up" of the two periodicals is very distinguishable; fraud is not alleged or proved; the plaintiff's case is rested on the confusion which will arise from the similarity of the names, and that probable loss will ensue to the plaintiff. I have been in much doubt as to the correctness of the decision, but after much consideration I do not think it can be upheld. Two elements must co-exist in a case of this kind where the inhibition is with regard to the use of a common geographical name; first, the publication must have been such as

Judgment.

Boyd, C.

to connect the proprietor with the publication in the mind of the trade or community interested. That is well proved in this case; there has been a long enough user to give the plaintiff a *locus standi* in Court, if the other essential has been satisfied. That is, in the case of a geographical name, has there arisen in connection with such prior user some secondary meaning attributable to the epithet which is sought to be appropriated,—some secondary meaning connoting character or quality of the product?

Now, this title "Canadian" in connection with "Bookseller," does not mean, so far as I read the evidence, any special kind of periodical or publication, but just asserts the fact that this particular print, "The Bookseller," is a Canadian publication. "Canadian," as here used, carries no more than its merely topical or geographical meaning, and does not suggest any different notion to those who take or read the paper.

All the evidence is rather to shew that the significant title was "The Bookseller"—that and nothing more—and that the plaintiffs were associated in the mind of the public with that journal as its publishers.

In a word, "Canadian" is not used by the plaintiff to identify or characterize some special literary or business product provided by him, but merely to designate the fact that his journal is published in and relates to Canada. Now, it is pretty clear law that a man cannot have monopoly or property in a geographical name as such; though there may be exceptional cases, where the local meaning has developed into an attribute of quality attaching to the product, and in these the Court will act to prevent fraudulent invasion of the first comer's rights. Such an exception was the famous "Stone ale" case, *Montgomery v. Thompson*, [1891] A. C. 217, and such another case was the *Glenfield Starch Case*, in which Lord Westbury said the name "Glenfield" had acquired a secondary signification or meaning in connection with a particular manufacture; in short, it had become the trade denomination of the starch made by the appellants: *Wotherspoon v. Currie*, L. R. 5 H. L., at p. 521.

This element is also adverted to by Chitty, J., in the *Castle Albion* case, where it is said: "Assuming that in point of law it is competent for the plaintiff to claim an exclusive right to this title or term, he can only do so by establishing incontrovertibly the proposition that the term has by general user come to be used in a secondary sense as an equivalent for and to denote exclusively his own goods: *Schove v. Schmincké*, 33 Ch. D. 551.

Judgment.

Boyd, C.

The term "Canadian" is the only thing struck at by the judgment. There is no cross-appeal, even if that would avail as to the rest of the name used by the plaintiff and defendant in common; and as this word "Canadian" is a geographical term, I think the evidence does not go far enough to justify the granting of an injunction.

But while the action is dismissed, I would give no costs. The defendant chose a name which was almost an echo of the plaintiff's and his reasons for doing so are not very cogent. He might easily have differentiated in many ways so as not to provoke comments and suggest suspicions as to why he so closely imitated the name so long used by the plaintiff. Of late cases I would note: *Reddaway v. Banham*, [1895] 1 Q. B. 286; and *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537.

A. H. F. L.

RE KERR AND COUNTY OF LAMBTON.

Municipal Corporations—County By-law—Guaranteeing Debentures of Town—Assent of Electors—By-law of Town—Time of Passing—Form of By-law—Guaranty—Liability.

The assent of the electors is not required to make valid a by-law of the council of a county corporation, passed under sec. 511, sub-sec. 2, of the Consolidated Municipal Act, 1892, guaranteeing the debentures of a municipality within the county.

At the time such a county by-law was passed, the by-law of the minor municipality authorizing the issue of the debentures had not been finally passed, but had been provisionally adopted and had received the assent of the electors, in accordance with sec. 293, and the form that the guaranty of the county was to take was such that it could not actually be given until after the final passing of the by-law of the minor municipality :—

Held, that, under the circumstances, the county by-law was not prematurely passed.

The by-law in question enacted : (1) that the corporation “do hereby guarantee the due payment of the debentures,” etc. ; (2) that upon each debenture should be written “payment hereof guaranteed by the corporation of the county,” etc. ; (3) that the warden and clerk should sign and seal such guaranty on each debenture ; (4) that when so signed the corporation should be liable to the holders of the debentures and responsible for the due payment thereof :—

Held, that the by-law did not impose upon the county corporation any greater liability than that of guarantors.

Statement.

APPLICATION by a ratepayer to quash a by-law of the municipal council of the corporation of the county of Lambton, entitled “A by-law to guarantee the payment of certain debentures and coupons attached, to be issued by the corporation of the town of Petrolia under a by-law of the said corporation provisionally passed on the 18th day of November, A.D. 1895, and which will be finally passed on the 24th day of February, 1896.”

The county by-law was passed on the 31st January, 1896, and was as follows :—

“Whereas the municipal council of the town of Petrolia, on the 18th day of November, 1895, provisionally passed a certain by-law entitled ‘A by-law of the corporation of the town of Petrolia to authorize the construction of a system of waterworks in and for the said town, and for that purpose to raise by way of loan on the security of

debentures of said corporation the sum of \$172,000,' and Statement.
which said by-law was submitted to the vote of the electors of said town on the 24th day of January, 1895, and carried, and will be finally passed on the 24th day of February, 1896.

And whereas it is intended to convey the water to be used from some source a considerable distance from the town of Petrolia, through a considerable section of the county of Lambton.

And whereas the corporation of the said county, in view of the circumstances aforesaid, have agreed with the corporation of the town of Petrolia to guarantee the due payment of the said debentures and the said coupons of interest upon maturity thereof respectively.

Be it therefore enacted by the corporation of the county of Lambton, through the council thereof, pursuant to the statute in that behalf :

First. That the said corporation do hereby guarantee the due payment of the debentures and coupons to be issued as aforesaid, under the said in part recited by-law, according to the terms of the said debentures and coupons respectively.

Second. That upon each of the said debentures and coupons shall be written or printed the following form of such guaranty : ' Payment hereof guaranteed by the corporation of the county of Lambton under by-law passed the 31st day of January, A.D. 1896.'

Third. The warden of the said county is hereby authorized and directed to sign the said guaranty on each of said debentures and coupons on behalf of said corporation, and the clerk of the said corporation is hereby authorized and directed to countersign the same respectively and affix the corporate seal of the said county.

Fourth. When so signed and countersigned the said corporation shall be liable to the holder or holders of the said debentures and coupons, and responsible for the due payment thereof at the time and place named therein respectively."

Argument. The application was heard by MEREDITH, C. J., in Court, on the 27th March, 1896. The grounds of the motion and the arguments of counsel are referred to in the judgment.
Aylesworth, Q. C., for the applicant.
Shepley, Q. C., for the corporation.

March 28, 1896. MEREDITH, C. J.:—

Application by a ratepayer to quash a by-law passed by the municipal council of the corporation of the county of Lambton for guaranteeing the debentures of the municipality of the town of Petrolia—a municipality within the county.

The first objection to the by-law is that the assent of the electors of the county to it was requisite to its validity, and that it was passed without that assent having been obtained.

The section of the Consolidated Municipal Act, 1892, giving to county councils the power to pass by-laws for the purpose for which the by-law in question was made is sec. 511, sub-sec. 2, and it enables such councils to make by-laws:

“2. For guaranteeing debentures of any municipality within the county, as the council may deem expedient.”

It is manifest that the power thus conferred is unfettered by any restriction or condition, unless it is to be found elsewhere in the statute; but it is said that the combined effect of secs. 340, 344, and 357 is to require the municipality to provide for every obligation or liability, absolute or contingent, which it has authority to enter into or incur, by the rates of the current year, or out of funds in hand available for the purpose, or, if that be not done, to obtain the assent of the electors to the entering into the obligation or incurring the liability, in accordance with the provisions of sec. 293, and that the liability to be incurred under sub-sec. 2 of sec. 511 forms no exception to this general rule.

Whatever may be the true scope and effect of these pro-

visions of the Act, I do not think that the latter contention of the applicant is well founded.

Judgment.

Meredith,
C.J.

The provisions of sec. 340 do not appear to me to be applicable to such a liability as is authorized to be created under the powers of sub-sec. 2 of sec. 511. The debts which sec. 340 deals with are debts in respect of which a rate is required to be settled for the payment of the principal and interest and which is to be raised annually during the currency of the debentures for payment of them at maturity. These requirements have plainly, I think, no application to such a by-law as that in question, and would involve the necessity of the raising by Petrolia of enough in each year to provide for the payment of its debentures and the county council levying a like rate for the payment of the debt and interest—a proceeding which, it appears to me, would be wholly unnecessary and not to have been contemplated by the Legislature.

Nor is the liability created by the by-law within the provisions of sec. 344, which by its terms is made applicable to by-laws for raising upon the credit of the municipality any money not required for its ordinary expenditure and not payable within the same municipal year—words applicable, I think, to the raising by the municipality for its own purposes, and those only, of moneys required by it for such purposes.

Evidence that the view I take is the correct one is, I think, found in sec. 634, which deals with the powers of municipal councils as to railways, one of which is to pass by-laws for indorsing or guaranteeing the payment of any debenture to be issued by any railway company to which certain Acts are applicable (sub-sec. 1), and in such a case provision is made that the by-law for that purpose is to provide for assessing and levying from time to time upon the whole ratable property of the municipality a sufficient sum to discharge the debt or engagement so contracted (sub-sec. 2), and by sub-sec. 5 the assent of the electors of the municipality to the by-law

Judgment. is required as a condition precedent to the incurring of such a liability.
Meredith,
C.J.

Where in the same Act one finds provisions dealing with a similar kind of obligation or liability which a municipality is permitted to enter into or incur in regard to different classes of corporate bodies, and the exercise of the one power is safeguarded by the enactment of provisions requiring the assent of the electors to the obligation being entered into or the liability incurred, and the other is not, cogent evidence is afforded that in the latter case the safeguard was not intended to be required as a condition precedent to the exercise of the powers conferred.

Sub-section 2 of sec. 341 and the exception of by-laws for a work payable entirely by local assessment contained in sec. 344 lead to the same conclusion. By the former of these provisions every municipal council, except a county one, is given power, in order, as sub-sec. 2 says, "to facilitate the negotiation of debentures issued thereunder (*i.e.*, under by-laws for works payable by local assessment) and add to their commercial value," to "declare that the debt to be created on the security of the special rate settled by the by-law is further guaranteed by the municipality at large." The Legislature by these provisions enabled the municipal councils of a township, city, town, or incorporated village to guarantee the payment of debts created on the security of special rates upon parts of the ratable property within the municipality without having to obtain the assent of the electors to their doing so, and when the like power was subsequently given to county councils, one would naturally expect that no restriction upon the exercise of the power that was not deemed necessary in the case of the bodies first invested with it would be imposed in the case of counties.

It may well be, I think, that, having regard to the manner in which the debenture debts of the municipalities of the Province, at least to creditors other than the Province itself, had been met, the Legislature deemed that little or no risk of being called upon to pay through default of the

principal debtor was likely to be incurred by the guaranteeing municipalities.

Judgment.

Meredith,
C.J.

Another instance of this confidence in the solvency of not minor municipalities only but of sections of them, is to be found in the drainage provisions of the Municipal Act, and still another in the case of debts of public school sections under the provisions of the Public Schools Act.

There is nothing, I think, in the decision of my brother Rose in the case referred to by Mr. Aylesworth, *Re Carpenter and Township of Barton*, 15 O. R. 55, which is opposed to my view of the effect of the legislation I have to deal with in this case. In that case the obligations which the municipalities had entered into were obligations of their own, and for the meeting of which it was their duty to provide funds within the current municipal year or by means of a by-law passed with the assent of the electors, and there was not, as in this case there is, a provision in the statute authorizing the doing of the very act which the council has done, nor were the other considerations which I have mentioned applicable to that case.

Upon the whole, therefore, I am of opinion that the by-law in question did not require the assent of the electors.

It was further objected that, inasmuch as the Petrolia by-law had not been finally passed by the council of that municipality, although it had been provisionally adopted and had received the assent of the electors in accordance with the provisions of sec. 293, at the time the county by-law was made, the latter was prematurely passed and is therefore invalid.

It is unnecessary to decide what force there would have been in the objection had the county by-law been passed before the Petrolia by-law had been assented to by the electors of the municipality; but I am of opinion that, in the circumstances of the present case, the objection taken is untenable. The liability which the county was undertaking was with reference to a definite scheme, the extent of the debt to be guaranteed, the object for which it was to be created, the mode of payment of it and of the

Judgment.
Meredith,
C.J.

interest of it, and the means by which the debt (principal and interest) was to be provided for, had all been determined upon, and everything had been done except the final passing by the council of Petrolia of their by-law, and the provision of the county by-law that the form its guaranty was to take was an indorsement of the guaranty on the debentures of Petrolia, which could issue only after the final passing of the by-law of that municipality; I see nothing in the language of the statute, nor upon principle is there anything, which, in my judgment, prevents the power of the county council being validly exercised under these circumstances; to hold otherwise would, I think, render the operation of the Act highly inconvenient, when it is borne in mind that meetings of county councils are usually held at long intervals and that the holding of special meetings is attended with very considerable expense to the ratepayers and some inconvenience to the members.

It was further objected that the by-law purported to impose upon the county corporation a greater liability than was authorized, that of guarantors, and to make it liable directly for the payment of the debentures; but I do not think that that is the fair meaning of the by-law; the form in which the corporation is to evidence its contract is given, and that is unobjectionable; the words which follow as to the liability of the corporation, read in connection with the form which its obligation is to take, do not enlarge the liability beyond that of guarantors, and is no more than a promise to be answerable or to be charged with the obligation with which the Petrolia corporation is primarily chargeable.

All the objections to the by-law, in my opinion, therefore, fail. Even had I entertained some doubt as to its validity, I should, in the exercise of my discretion, have refused to quash the by-law.

The motion is refused with costs.

E. B. B.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF MORRIS V. THE
CORPORATION OF THE COUNTY OF HURON.

Statutes—Repeal of Act—Exception—Interpretation Act—Con. Mun. Act, 1892, 55 Vict. ch. 42, sec. 533a (O.)—57 Vict. ch. 50, sec. 14 (O.)—Construction of.

Section 14 of the Municipal Amendment Act, 1894, 57 Vict. ch. 50 (O.), must be read with sec. 8, sub-secs. 43 and 48 of the Interpretation Act, R. S. O. ch. 1, and so read, rights of action accrued at the passing of the former Act are not affected thereby.

On the 29th of April, 1893, a township corporation obtained an award against a county corporation under sec. 533a of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges expended by them, and while an appeal against the award was before the Court of Appeal, the 57 Vict. ch. 50 (O.), repealing sec. 533a was passed:—

Held, that there was no “arbitration pending” by reason of the appeal at the time of the passing of the repealing Act.

The plaintiffs were held entitled, notwithstanding the repeal of sec. 533a (O.), to recover the proportionate amount paid or agreed to be paid by them, from the commencement of 1893 to the date of the passing of the repealing Act.

Judgment of MEREDITH, C.J., 26 O.R. 689, varied

THIS was an action to recover the cost of the maintenance of certain bridges. Statement.

The corporation of the township of Morris, under section 533a of the Consolidated Municipal Act, 1892, had an arbitration with and obtained an award against the county of Huron for part of the cost of the maintenance of these bridges.

The action was tried at Goderich, before MEREDITH, C. J., without a jury, on May 8th, 1895.

The learned Chief Justice found that notwithstanding the repeal of sec. 533a by sec. 14 of 57 Vict. ch. 50 (O.), the township was entitled to recover the amount so expended up to the 1st of September, 1894, and he accordingly entered judgment for the plaintiffs.

The judgment is reported in 26 O. R. 689, where the facts are fully stated.

From this judgment the defendants appealed on the grounds: (1) that the judgment was erroneous and con-

Statement. trary to law, in that an improper construction was placed upon the statutes in question ; (2) that according to the proper construction of the said statutes, the plaintiffs were not entitled to recover at all, and the action should have been dismissed.

The plaintiffs also appealed upon the grounds : 1. That the judgment improperly construed the statutes in question, in that it limited the plaintiffs' right to contribution upon the award sued upon to the date of the coming into force of the Act repealing section 533a of the Consolidated Municipal Act under which the award was made ; 2. That upon the proper construction of the said statutes, the plaintiffs were entitled to judgment as if the said repealing Act had not been passed, or were entitled to judgment for contribution in respect of all expenditures made by them in pursuance of contracts entered into or obligations incurred before the date of the coming into force of the said repealing Act, and judgment should have been given accordingly.

On January 23rd, 1896, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., Garrow, Q. C., supported the defendants' motion and shewed cause to the plaintiffs.

Aylesworth, Q. C., and Dickenson, contra.

The arguments and cases cited sufficiently appear in the judgment appealed from.

March 3rd, 1896. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The award herein was made on the 29th day of April, 1893, under the provisions of 53 Vict. ch. 50, sec. 30, forming section 533a of the Consolidated Municipal Act, 1892, and an appeal against the award was heard before Ferguson, J., who dismissed the same, and an appeal was had from his judgment to the Court of Appeal, and while the same was pending, the Act 57 Vict. ch. 50, was passed by

section 14, of which section 533a of the Consolidated ^{Judgment.} Municipal Act of 1892, was repealed; and after the ^{Armour, C.J.} passing thereof, the said appeal was heard by the Court of Appeal, who dismissed the same.

Section 14 of the Act 57 Vict. ch. 50, came into force on the 5th day of May, 1894, and not on the 1st day of September, 1894, as the learned Chief Justice supposed.

This section must be read with section 8, sub-sections 43 and 48 of the Interpretation Act: *Ex p. Raison*, 39 W. R. 271, 63 L. T. N. S. 709, 60 L. J. Q. B. 206, 7 Times L. R. 185; Imperial Act 52 & 53 Vict. ch. 63.

And so reading it, I am of the opinion that the right of action which the plaintiffs undoubtedly had against the defendants by virtue of sub-section 3 of section 533a of the Consolidated Municipal Act, 1892, at the time of the coming into force of said section 14, was not affected by the coming into force thereof.

It was contended that this was the case of an "arbitration pending" within the meaning of section 14, by reason of the appeal against the award under section 404 of the Consolidated Municipal Act, 1892, pending at the time of its coming into force.

But I think that when the award was made, the arbitration ceased to be any longer pending, the arbitrators then being *functi officio*, and although the matters referred to them might have been remitted to them by the Court, this did not make it an "arbitration pending" within the meaning of the section.

It was also contended that inasmuch as section 14 provided that such report should not affect any contract or agreement theretofore made or entered into, it was intended to affect an award theretofore made on the principle of the maxim *expressio unius est exclusio alterius*; but, as I pointed out in *Argles v. McMath*, 26 O. R. 224, this maxim is not of universal application. And I do not think that upon the fair reading of section 14 with section 8, sub-sections 43 and 48 of the Interpretation Act, and upon the proper construction of them, the right of action

Judgment. of the plaintiffs can be held to have been affected, or the
Armour, C.J. award which was an incident to such right of action done
away with, for the plaintiffs' right of action was really
grounded upon sub-section 3 of section 533a, although the
award was a necessary incident to the existence of such
right of action.

Nor do I think that the reading of section 8, sub-sections 43 and 48 of the Interpretation Act, with section 14, produces any inconsistency.

The plaintiffs will, therefore, have judgment against the defendants for forty per cent. of the cost of the construction and maintenance of the bridges mentioned in the award, paid or agreed to be paid by the plaintiffs prior to the 5th day of May, 1894, and commencing with and including the time from the commencement of the year 1893 to that date, and there will be a reference as directed by the judgment of the learned Chief Justice to ascertain the amount.

There will be no costs of the motion or of the cross-motion.

G. F. H.

[CHANCERY DIVISION.]

UNION SCHOOL SECTION OF EAST AND WEST WANAWOSH
AND HULLETT V. LOCKHART.

*Public Schools—Union School Section—Alteration—Petition of Ratepayers
—Award—54 Vict. ch. 55, sec. 87 (O.).*

The "joint petition" of five ratepayers from each of the municipalities concerned, required under 54 Vict. ch. 55, sec. 87, sub-sec. 1 (O.), for the formation, alteration or dissolution of a Union School Section, means that each set of five ratepayers shall join in a petition to the municipal council of the municipality, of which they are ratepayers, and not that five ratepayers from each municipality concerned must join in each petition to each municipality.

Judgment of MEREDITH, C.J., 26 O. R. 662, following *Trustees of School Section No. 6, York v. Corporation of York*, noted 26 O. R., at p. 664, reversed.

Where the award in such case was that no action should be taken on the petition, the prohibition in sub-section 11 of section 87 against any new proceedings for a further period of five years, was held not to apply.

Judgment of MEREDITH, C.J., affirmed on this point.

THIS was an action tried before MEREDITH, C. J., without Statement. a jury, at Goderich, on the 8th of May, 1895.

The questions raised were as to the number of ratepayers required from each municipality concerned, to a petition for the formation or dissolution of a Union School Section, under 54 Vict. ch. 55 sec. 87, sub-sec. 1 (O.); and as to the effect of an award which determined that no action should be taken on the petition.

The learned Judge held that in all cases there must be a joint petition of five ratepayers from each municipality concerned, otherwise the award founded on it would be void; and that such award would not be validated by section 96, which provides that where no notice to quash is given within the time prescribed, the award should be deemed valid. He also held that the award here being that no action should be taken on the petition, the restriction in sub-section 11 of section 87 of the said Act against new proceedings for five years, did not apply.

The learned Chief Justice entered judgment for the defendants, and his judgment is reported in 26 O. R. 662.

Argument. From this the plaintiffs moved on notice to set aside the judgment entered for the defendant, and have the judgment entered in their favour on the following grounds:—
1. That the judgment was based entirely upon the construction of the several provisions of the Public School Act, 1891, which construction was erroneous. 2. That by the true construction of the said provisions, the plaintiffs were entitled to judgment in their favour, and that the judgment was contrary to law.

On 24th January, 1896, before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ., *J. R. Cartwright*, Q.C., supported the motion.

Dickenson, contra.

February 13th, 1896. ARMOUR, C. J. :—

The first question raised depends upon the proper construction to be placed upon sub-section 1 of section 87 of the Public Schools Act, 1891, and the difficulty in its construction arises from the use of the words "joint petition" therein.

According to the view of the learned Chancellor as expressed in the *The Trustees of School Section No. 6, York v. Township of York*, (see 26 O. R. 662) five ratepayers from each of the municipalities concerned must join in each petition to the council of each such municipality and this view was concurred in although not accepted by the learned Chief Justice of the Common Pleas.

According to this view in the present case five ratepayers of the township of Hullett, five ratepayers of the township of East Wawanosh and five ratepayers of the township of West Wawanosh, fifteen in all, should have signed each petition to the municipal councils respectively of Hullett, East Wawanosh and West Wawanosh.

This view requires us to read the words "joint petition," joint petitions and render the words "to their respective municipal councils," discordant.

The words "joint petition" in my opinion refer to the

joint petition of each set of five ratepayers and not to the ^{Judgment.} joint petition of every set of them the meaning being that ^{Armour, C.J.} five ratepayers from each municipality concerned shall join in a petition to the municipal council of the municipality, of which they are ratepayers.

So that in the present case what was done in 1893 was properly done, that is to say five ratepayers of the township of Hullett joined in a petition to the municipal council of Hullett, five ratepayers of the township of East Wawanosh joined in a petition to the municipal council of East Wawanosh, and five ratepayers of the township of West Wawanosh joined in a petition to the municipal council of West Wawanosh.

The other question raised was whether the award made in 1893 prevented any alteration of the union school section for five years after the making of this award, which award determined that no action should be taken upon the application.

Such an award as that made in 1893, that no action should be taken upon the application is not such an award as is within the contemplation of section 87 and no appeal is given from such an award, and such an award is not an award within the meaning of sub-section 11 of section 87, and the prohibition therein does not apply to prevent the alteration of a union school section within five years after such an award.

The judgment of the learned Chief Justice upon this question must therefore be affirmed; and the appeal will be dismissed with costs: see R. S. O. ch. 132, sec. 17; *Beck v. Pierce*, 58 L. J. N. S. Q. B. 576.

STREET, J. :—

I think the construction of sub-section 1 of section 87, which requires that each set of five ratepayers shall petition the council of their own municipality is to be preferred to that which requires the whole fifteen ratepayers to join in the petition to each of the three municipi-

Judgment. palities concerned. If the word "joint" were omitted
Street, J. from the section this would undoubtedly be its meaning ;
and it is easier to read the word "joint" as meaning
that the petitions are to be indetical in substance, than
to transpose the meaning of the words "their respective
municipal councils," so as to convey the idea that fifteen
ratepayers from three municipalities are to join in three
identical petitions to the three councils.

Upon the other point I also agree in the judgment of
the Chief Justice that an award determining that no action
be taken upon the petition is not an award at all within
the meaning of sub-section 11 of section 87, so as to put
an end to all further attempts at change for five years.
The award contemplated by the various sub-sections taken
together appears to be one to take effect by the union
alteration or dissolution of existing school sections, and not
one which decides that no such union alteration or dissolu-
tion is to take place.

I agree that the appeal should be dismissed with costs.

FALCONBRIDGE, J., concurred.

G. F. H.

[CHANCERY DIVISION.]

CARROLL ET AL. V. BEARD ET AL.

Landlord and Tenant—Distress—Conditional Sale of Goods—Lien—Property—"Interest"—Statutes—Repeal—Substitution.

An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with, until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question :—

Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent and must be read out as mere surplusage ; and so reading the agreement, the transaction was one of conditional sale, and, under 57 Vict. ch. 43 (O.), only the interest of the tenant in the goods could be distrained on :—

Held, also, that the Act 57 Vict. ch. 43, which repeals sec. 28, sub-sec. 1, of R. S. O. ch. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by sec. 42 of R. S. O. ch. 143, applied.

THIS action was brought by Robert Carroll and Margaret Yorke, administratrix of the estate and effects of Lionel Yorke, deceased, to recover damages for illegal distress and for other relief, against the defendants E. Beard and Mary Rebecca Beard, and Peter Small, their bailiff. Statement.

The statement of claim alleged as follows : (5) That on or about the 11th December, 1889, the plaintiff Margaret Yorke, as such administratrix, agreed with one Joseph Yorke for the purchase by him of certain plant, machinery, implements, utensils, and other goods and chattels, being part of the estate of the deceased, for \$6,186.35, payable as follows : \$3,000 on the date of the agreement, and the balance at the end of two years therefrom, with interest, to be secured by a promissory note of Joseph Yorke, at six months, to be renewed at his expense, if he so desired, for three further periods of six months each ; and on payment of the balance Margaret Yorke was to sell and effectually

Statement. assign, transfer, and set over and assure unto Joseph Yorke, his executors and administrators, all the plant, etc., described in the schedule; and until such balance and interest should be fully paid and satisfied, the property was to remain the property of Margaret Yorke, as such administratrix, and she was to have a lien upon it for such balance. (7) That at the date of the agreement the property in question was lying on a certain wharf and premises (described), and such property, or a portion thereof, had ever since continued to be and was now upon such premises subject to the terms of such agreement. (8) That Joseph Yorke paid the \$3,000 in cash, as provided by the agreement, and gave his promissory note for the balance, in respect of which there still remained due \$1,625.25 and interest. (9) That Joseph Yorke, from time to time, gave renewal notes for such balance of the purchase money as remained unpaid to the plaintiff Margaret Yorke, who, requiring to discount one of such notes for the purposes of the estate, and being required to procure an additional indorsement, applied to the plaintiff Carroll to become such indorser; and on the 6th January, 1892, it was agreed between the two plaintiffs that, in consideration of his indorsing such note, she would hold the property in question as security to him for his indorsement. (10) That the plaintiff Robert Carroll indorsed such note and renewals thereof, in pursuance of such agreement; and on 20th July, 1894, indorsed a note for \$1,650, being the balance of the purchase money then due. (11) That when such last mentioned note fell due, it was dishonoured, and was paid and retired by the plaintiff Robert Carroll. (12) That Joseph Yorke was still indebted in respect of the purchase money in the sum of \$1,652.25 and interest, and, by the terms of the two agreements, the property in the plant, etc., remained vested in the plaintiffs, who, by virtue of such two agreements, had a lien thereon for such amount. (13) That on or about the 20th August, 1894, the defendants E. Beard and Mary Rebecca Beard, claiming to be the lessors of the premises upon which the plant, etc.,

were situate, directed the defendant Small, as their bailiff, to distrain the goods and chattels of Joseph Yorke thereon for \$701 as rent due. (14) That the defendant Peter Small thereupon seized the plant, etc., forming a portion of the property before mentioned, and advertised it for sale. (17) That the plaintiffs had obtained an interim injunction order restraining the defendants from selling such property, except subject to the interest of the plaintiffs as unpaid vendors. (18) That before such seizure, the defendants the Beards and Joseph Yorke had allowed the municipal taxes upon the premises in question to become in arrear, and, after the seizure by the defendants, the municipal corporation caused a seizure to be made of the property already seized by the defendants for payment of the taxes, and in order to protect the property and prevent a sale by the corporation, the plaintiff Carroll paid the taxes and charges, amounting to \$151.13. (19) That by reason of such payment, the plaintiff Carroll became entitled to recover payment of that sum from the defendants Beard, and to a lien or charge therefor upon the premises in question.

The plaintiffs, therefore, claimed: (1) to have the injunction made perpetual; (2) \$2,000 damages; (3) payment to the plaintiff Carroll of \$151.13 and interest; (4) a declaration of his right to a lien and enforcement thereof.

The nature of the defence and the facts which appeared in evidence are sufficiently set out in the judgment.

The action was tried before MACMAHON, J., without a jury, at Toronto, on the 6th and 14th May, 1895.

Moss, Q. C., for the plaintiffs.

Arnoldi, Q. C., and *Bristol*, for the defendants.

August 14, 1895. MACMAHON, J.:—

Lionel Yorke in his lifetime was the lessee of the premises mentioned in the statement of claim, under an inden-

Judgment. ture from the defendant Mary Rebecca Beard. After
MacMahon, becoming such lessee, Lionel Yorke erected on said premises
J. certain buildings. In one of the buildings he placed, and
bricked in, a boiler, for the purpose of running the engine
and machinery in connection with his business of a contractor.

Lionel Yorke died on the 13th April, 1889 ; and letters of administration were granted to his widow, the plaintiff Margaret Yorke, on the 2nd May, 1889.

On the 11th December, 1889, Margaret Yorke, as administratrix of the estate of Lionel Yorke, by an agreement under seal, sold to Joseph Yorke the plant, machinery, implements, and utensils, the property of the estate, as described in a schedule annexed to said indenture, at seventy-five cents on the dollar ; being at such rate the sum of \$6,186.35 ; payable, \$3,000 in cash, and the balance at the end of two years, with interest at six per cent. ; such balance to be secured by the promissory note of Joseph Yorke, payable in six months, which was to be renewed, if so desired by Joseph Yorke, three times, for periods of six months each. There is a covenant by the vendor, Margaret Yorke, that she will, on payment of the balance of the said purchase money and interest, well and effectually assign, transfer, set over, and assure unto the said Joseph Yorke, his executors and administrators, all the plant, machinery, implements, etc., particularly enumerated and described in said schedule. The agreement also contains this condition :

“ And it is hereby further agreed by and between the said parties hereto respectively, that until the said balance of the said purchase money and interest shall be fully paid and satisfied, the said Margaret Yorke, as such administratrix as aforesaid, her executors, administrators, and assigns, shall have a lien on said plant, machinery, implements, utensils, and other goods and chattels, partly enumerated and described in the schedule hereunder written, for the balance of such unpaid purchase money and interest, as and for and by way of a vendor's lien for unpaid purchase

money, and that no actual delivery of such property shall be made, nor shall possession be parted with by the said Margaret Yorke, as such administratrix as aforesaid, until the said balance of the said purchase money and interest shall be fully paid and satisfied by the said Joseph Yorke."

Judgment.
MacMahon,
J.

The draftsman in preparing the agreement might have expressed the intention to make the sale a conditional one in more apt language; but, as by the agreement the property in the plant, machinery, etc., is not to pass until the whole of the agreed purchase money has been paid, the intention is thereby made manifest. When the condition as to payment was fulfilled, the vendor, Margaret Yorke, was to assign and transfer the plant, machinery, etc., to the vendee. So that, although possession was delivered, the sale under the agreement being conditional, the property in the plant, etc., remained in the vendor: see *Mason v. Johnson*, 27 C. P. at pp. 213, 214.

It is not necessary that I should discuss the question of lien, as, there being an express contract between vendor and purchaser, whatever rights Margaret Yorke has, she has under that contract. As said by Lord Chancellor Westbury in *Chambers v. Davidson*, L. R. 1 P. C. at p. 305, "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limits their rights by the extent of the express contract that they have made."

Through some confusion of ideas in preparing the agreement, the last clause provides for the vendor's lien by giving her power to hold the property. It is not a question of lien or no lien. The sale was a conditional one, the vendor taking the vendee's promissory note as collateral security under the agreement, and under these circumstances the question of lien does not arise.

Permitting Joseph Yorke to have possession of the pro-

Judgment,
MacMahon,
J.

perty would not alter the contract or deprive it of its conditional character. And even the sale by Joseph Yorke of a part of the property would not alter the contract, unless I could find as a fact—which I cannot do—that the whole of the plant, machinery, etc., had been delivered to and taken possession of by Joseph Yorke as purchaser freed from the terms of the agreement.

By an agreement under seal, dated the 6th January, 1892, and executed by Margaret Yorke, Joseph Yorke, and the plaintiff Carroll, Margaret Yorke, as administratrix, etc., agreed that the whole of the plant, etc., purchased by Joseph Yorke, should be held and retained, and be available at all times to Carroll as a security for the indorsation by him of the promissory note of Joseph Yorke for \$3,777.53, or for any renewal or renewals thereof.

Joseph Yorke sent a part of the plant to Newfoundland and sold other portions thereof. Carroll knew that some of the buildings were being pulled down, and that a part of the plant, etc., had left the premises. He stated that all he was concerned about was to see that sufficient was left on the premises to secure him against his indorsation.

On the 1st April, 1890, the defendant Mary Rebecca Beard, by an indenture of lease (to which Margaret Yorke, as administratrix of Lionel Yorke's estate, was a party, for the purpose of surrendering the lease held by the estate) leased the said premises to Joseph Yorke for the term of ten years; the lessee covenanting to pay the taxes.

The defendants Mary Rebecca Beard and Eleanora Beard, on the 20th August, 1894, issued a distress warrant directed to the defendant Small to distrain the goods and chattels of Joseph Yorke and Farquhar & Yorke, and the goods of all other persons liable to be distrained on the land and premises mentioned in the lease, for the sum of \$701, being for rent due on the 1st July, 1894. Small distrained on goods which it is conceded are goods mentioned in the agreement for sale of 11th December, 1889. It was also conceded that the goods distrained for taxes are goods mentioned in the said agreement.

The amount due by Joseph Yorke on the 23rd October, 1894, as balance of the purchase money was \$1,652.25. And, as under 57 Vict. ch. 43* the landlord shall distrain only the interest of the tenant in any goods on the premises under a contract by which he is to become the owner thereof upon the performance of any condition, the landlord could not sell the absolute property in the goods, even if any rent were due, as to which there was no evidence.

Judgment.

MacMahon,
J.

There must be an order perpetually restraining the defendants from selling the property except subject to the rights of the plaintiffs as unpaid vendors.

As to the taxes. They were payable by the tenant Joseph Yorke. The amount was paid by the plaintiffs in order to prevent a sale of goods, the right of property in which still remained in them, but which right of property was subject to be defeated by the payment of the balance of the purchase money by Joseph Yorke.

As in *Edmunds v. Wallingford*, 14 Q. B. D. 811, the plaintiffs, the owners of the goods, redeemed them from the tax collector, the plaintiffs are entitled to be reimbursed by the person, on whose behalf the taxes were paid, that is, by Joseph Yorke, who was liable under the lease for the payment thereof. It was the compulsory payment by the plaintiffs of a tax or debt due by Joseph Yorke, and had he been a party to the suit, judgment could have gone against him for the sum of \$151.13.

The defendants are entitled to succeed as to the cause of action set out in the 18th and 19th paragraphs of the statement of claim.

*1. Sub-section 1 of section 28 of the Act respecting the law of Landlord and Tenant is repealed and the following substituted therefor :—

(1) A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises ; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to

Judgment. No evidence as to damages was given, but if it is the intention to claim substantial damages, I will hear evidence.
MacMahon,
J.

There will be judgment in the terms already stated for the plaintiffs, with costs (except as against defendant Small), on all the causes of action in the statement of claim, except the cause of action mentioned in the 18th and 19th paragraphs thereof, in respect of which there will be judgment for the defendants dismissing the action without costs.

The defendants the Beards appealed from this judgment, and their appeal was argued before a Divisional Court composed of BOYD, C., and ROSE and ROBERTSON, JJ., on the 15th January, 1896.

Arnoldi, Q. C., for the appellants. The plaintiffs claim the goods because, as they say, the property therein did not pass to Joseph Yorke until paid for. But the moment possession was delivered, the property passed. There is no stipulation in the agreement that the property in the goods shall not pass. The word "property" is used in the agreement, but as a short way of mentioning the goods described in the schedule. There could not be a vendor's lien unless the property did pass. We have proved as a fact that there was an absolute delivery, and the plaintiffs are limited to a vendor's lien. If the parties to the contract do something inconsistent with it at a sub-

the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord; nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family.

(The words in italics are the new words introduced by the amendment.)

sequent date, they make a new bargain. I refer to Blackburn Argument.
on Sales, 2nd ed., p. 36; *Edan v. Dudfield*, 1 Q. B. at p. 306; *Lillywhite v. Devereux*, 15 M. & W. 285; *Baldey v. Parker*, 2 B. & C. 87; *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & C. 722; Benjamin on Sales, 4th ed., pp. 160, 161, 169, 807; Smith's Mercantile Law, 10th ed., p. 704; *Mason v. Hatton*, 41 U. C. R. 610. Then, as to the question of the retroactivity of 57 Vict. ch. 43 (O.), which substitutes a new sub-section for sub-sec. 1 of sec. 28 of the Act respecting the law of Landlord and Tenant. Section 42 of the latter Act says that sec. 28 shall apply only to certain tenancies. Section 28 is a revision of 50 Vict. ch. 23, sec. 16. The new Act cannot apply to a tenancy created before it was passed.

Moss, Q. C., for the plaintiffs. It is not open to argument that the parties intended to or did alter their position under the agreement. What is said about subsequent dealings does not affect the question. Allowing goods to remain in the possession of the vendee after default does not affect the rights of the vendor: *Mason v. Bickle*, 2 A. R. 291. The new sub-section substituted by 57 Vict. ch. 43 must be read as part of R. S. O. ch. 143, and applies to all tenancies created after 1st October, 1887. The plaintiffs' right arose when the warrant was put in the hands of the bailiff. The statute cannot be called retrospective because part of what brings it into action happens before its passing: *Regina v. Whitechapel*, 12 Q. B. 120; *Regina v. St. Pancras*, *ib.* 129; *Duke of Devonshire v. Barrow Steel Co.*, 2 Q. B. D. 286.

Arnoldi, in reply. The landlord's rights are preserved by sec. 8, sub-sec. 43, of the Interpretation Act, R. S. O. ch. 1. There was rent actually in arrear before the passing of the Act. A repeal cannot take away the right to dis-train for that rent.

February 18, 1896. *BOYD, C.*:—

The proper construction of the instrument of 11th December, 1889, appears to be on the whole substantially

Judgment.

Boyd, C.

this. There was an executory agreement to sell the chattels in question and to make an effectual transfer of them upon payment of the price. Subsidiary to this, and as security for the payment, possession of the goods was not to be parted with by the vendor, and it was also stipulated that there should be "a vendor's lien" for the price. This last term must be taken, I think, as a piece of inappropriate surplusage. "Inappropriate," because the right of lien, legally speaking, arises from the operation of law, and not from the expression of the parties. And "surplusage," because with the retention of possession provided for, there was no place for lien in dealing with chattels. The subsequent surrender of the term and the possession of the buyer as lessee of the premises would not change the original contract as to the goods. The mere fact of his permissive possession would not *per se* operate to determine the condition that he was not to have full ownership till the price was fully paid.

All things considered, I think the claim as to vendor's lien (if anything is to give way) must be read out of the contract as inconsistent with its general tenor: and if so, all difficulty in the construction of the contract disappears. Substantially the transaction would be one of conditional sale, and under the late statute as to landlords only the interest of Yorke in the goods could be sold, and not the *corpus* of the goods. His interest would be just what would be left after the balance of price is deducted out of the value of the goods seized.

As to the question of the statute 57 Vict. ch. 43 (O.) affecting existing leases, there appears to be no room for argument: if the language of the revised statute ch. 143, in sec. 42, is to be read as applying to the new sub-section which by the Act of 1894 is substituted for the old sub-section in section 28 of the revision and sub-section 1. The Legislature may not have intended that the new provision should apply to existing leases. It may have been an oversight to leave sec. 42 of the revised statute so that it applies to the new provision which is substituted in sec. 28.

But if so, the modern method is to leave the remedy in the hands of the Legislature, and not to qualify the enactment according to the presumed intention by judicial amendment. As aptly put by an English Judge, "Our limited function is not to say what the Legislature meant, but to ascertain what the Legislature has said that it meant:" per Mathew, J., in *Rothschild v. Commissioners of Inland Revenue*, [1894] 2 Q. B. at p. 145; and see *Gilman v. Crowley*, 7 Ir. C. L. R. 557.

Judgment.

Boyd, C.

Altogether, I favour the affirmance of the judgment, though I have not reached this result without much hesitation.

ROSE, J. :—

The first question is as to the construction of the contract. Our learned brother, the trial Judge, came to the conclusion that, upon a fair reading of the contract, it was manifest that the intention of the parties was that the property should not pass. The defendants contest this proposition.

The contract provides for the sale of the property, the purchase money to be paid in instalments, the purchaser having the right to pay off the purchase money on the days and times therein mentioned, with a privilege of making any payment on account that he might desire, or paying the whole at any time before the expiration of the two years named in the contract. The vendor then covenanted with the vendee that she (the vendor) would, "on payment of the balance of the said purchase money and interest, well and effectually assign, transfer, set over, and assure" unto the said vendee, the property named in the agreement; and by the last clause of the deed it was agreed as follows: "That no actual delivery of such property shall be made, nor shall possession be parted with by the said Margaret Yorke, as such administratrix as aforesaid, of said property, until the said balance of the said purchase money shall be fully paid and satisfied by the said Joseph Yorke, his executors or administrators."

Judgment.

Rose, J.

I suppose if these were the only two clauses in the agreement referring to the passing of property, that it would hardly be contended that either possession or property would pass to the vendee until payment in full of the purchase money, and that upon such payment the vendee would be entitled to a conveyance of the property in the goods from the vendor. But it was contended that it was made manifest that the property should pass by reason of the following provision being inserted in the deed, namely, "And it is hereby further agreed and declared by and between the said parties hereto respectively, that until the said balance of the said purchase money and interest shall be fully paid and satisfied, the said Margaret Yorke, as such administratrix as aforesaid, her executors, administrators, and assigns, shall have a lien on the said plant * * for the balance of such unpaid purchase money and interest, as and for and by way of a vendor's lien for unpaid purchase money"—these words immediately preceding and being followed by the words above set out, namely, and "that no actual delivery," etc.

I cannot come to that conclusion. It would seem rather that a misapprehension existed in the minds of the parties as to what was necessary to constitute a lien. Such words were not apt in any view. If the vendor retained possession of the property, and the property in the goods remained in the vendor until payment, a lien of course could not exist, because it is one of the essentials of a lien that it should be with reference to the property of another, and not to the property of the person claiming the lien. In other words one cannot have a lien on his own property. If the property were to pass and the vendor retain possession, it was manifestly unnecessary to provide for a lien, because, in order to constitute a lien, there must be a retention of possession, and the very moment that the delivery took place and the possession was parted with, the lien was gone. Such words being inapt and unnecessary, and not chosen with regard to the facts, or the legal position which would arise upon either

view, namely, that the property did or did not pass, I think that they must be rejected as a provision which did not indicate that it was the intention of the parties that the property should pass. I see no reason why the parties should agree that no actual delivery should be made and possession be parted with until payment of the purchase money, and that upon the payment of the purchase money the vendor should assign, transfer, set over, and assure the property to the vendee, unless it was the clear intention of the parties that the vendor should retain both possession and property. Nor am I able to give effect to the contention that the provision in the deed that the vendee, during the two years given for the payment of the purchase money, should keep the property insured in the name of the vendor, shews that the intention of the parties was that the property should pass. The provision is in favour of the view that the property in the goods remained in the vendor, and so the insurance should be effected in her name.

Judgment.

Ross, J.

I certainly have no such clear opinion that the property did pass by virtue of the provisions in the deed as would entitle me to say that the learned trial Judge was in error in coming to the conclusion he did, or in placing upon the deed the construction which he has placed.

I am further of opinion that the learned trial Judge was quite right in holding that the subsequent delivery of possession did not pass the property in the goods. I think that the rights of the purchaser upon this question must be determined by a construction of the deed on the day it bears date, and that subsequent transactions cannot assist us in determining what was the legal effect of such deed. If by the terms of the deed, properly construed, property did not pass at its date, and if it was agreed that the property should not pass until the payment of the whole of the purchase money, I think it would be placing a construction upon the act of the parties that would bear very hardly against the vendor, if we held that a subsequent delivery of the possession of the goods was a waiver or a

Judgment. giving up of the benefit which the vendor had retained by the deed ; that is to say, was a delivery not only of possession, but was a giving up of the property in the goods to the vendee, so as to lose all the benefit of the provisions contained in the deed. I see no reason why the vendor should lose the property in the goods, simply because she agreed subsequently to permit the vendee to have possession of them.

Rose, J.

I cannot think either that, for the purpose of construing the deed and ascertaining its effect on the day it bears date, we can at all assume that the intention of the parties was that the vendee should have possession of the goods, and that the clause providing for a lien was inserted for such purpose. This would be in direct contravention of the provision entitling the vendor to retain possession and not to deliver up the same until payment of the purchase money.

The other point upon which judgment was reserved was whether the amendment of the law of landlord and tenant by 57 Vict. ch. 43 (1894) applied to existing leases. By such amendment, sub-sec. 1 of sec. 28 of the Act respecting Landlord and Tenant, R. S. O. ch. 143, was repealed, and a new sub-section substituted therefor. The new sub-section was, in terms, the same as the old one, save that the right of a landlord to distrain was restricted to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, etc. By 50 Vict. ch. 23, sec. 2, the right of a landlord to distrain was restricted (speaking generally) to the goods and chattels of the tenant or person liable for the rent, and a landlord was prohibited from distraining for rent on the goods and chattels of any other person, although the same should be found on the premises. This section was carried into the revision as sec. 28 without alteration. By sec. 16 of chapter 23, sec. 2, as also certain other sections, was declared to apply only to tenancies created after such Act should go into force, and it was provided that the Act should go into force on the 1st

day of October, 1887. In the revision, by sec. 42, it was provided that sec. 28, as well as certain other sections, should apply only to tenancies created on or after the 1st day of October, 1887. The lease in question was made after the 1st day of October, 1887.

Judgment.

Ross, J.

The goods in question may be described as goods on the premises in the possession of the tenant under contract for purchase. If the amendment of 1894 applies to tenancies created on and after the 1st day of October, 1887, it is manifest that such property was not liable to distress, and that the judgment of our learned brother must be affirmed. If such amendment does not apply to leases created on or after the 1st day of October, 1887, then the appeal must be successful.

It is no doubt clear that, generally speaking, the substituted section must be read as part of chapter 143, and as consistent with all the provisions of that chapter, and as far as possible such construction must be given to the whole Act as will prevent any inconsistency. It is further manifest that the provisions of sec. 28, before amendment, applied to the tenancy in question, being a tenancy created after the 1st day of October, 1887. It is also, I think, a rule of construction that the Legislature must be presumed to know the law, and to have before it each and every section of an Act when dealing with such Act: see Endlich on the Interpretation of Statutes, ch. 7, sec. 182. I must take it, therefore, that when sec. 28 was repealed and a new section substituted therefor, the Legislature knew that, in terms, sec. 42, unless amended, would apply to make such substituted section apply to tenancies created after the 1st October, 1887. For by subsec. 1 of sec. 8 of the Interpretation Act it is declared that "the law shall be considered as always speaking," and, therefore, from the moment of the introduction of the substituted sec. 28, sec. 42 spoke, and has continued speaking in the language in which it was originally framed.

And I think it must further be held that if the Legislature had intended to prevent the application of the new section 28

Judgment.

Rose, J.

to existing tenancies, it would have said so. I do not think this position is weakened at all by considering the legislation of the 50th Vict. It is true that the Legislature did declare that the amendment of the law there made should not be retroactive, and a very good reason might be suggested, viz, the amendments there made were very large—rights which landlords had enjoyed of a very liberal character were being swept away. Whereas up to that time landlords had the right to take goods on the premises for rent, by that Act such rights were restricted, and notice was given to the world before the Act came into force, and it was made to apply only to future tenancies; but the intention of the Legislature was made apparent, namely, to confine the landlord, speaking generally, to the goods of a tenant, and to exempt from distress the goods of a stranger. It must be presumed that the Legislature found that the injustice from which strangers to a tenancy were relieved by the 50th Vict. still remained as to goods which really belonged to such strangers, but in which the tenant had some interest by reason of a contract of purchase, and to more fully carry into effect the remedial legislation, the Act of 1894 was passed. It will be observed that such Act does not affect at all the contract between the landlord and the tenant; it does not deprive the landlord of any right against the tenant; it does not exempt from distress any goods of the tenant, or any right or interest that the tenant may have in the goods upon the premises. So that in construing the statute we are freed from any difficulty arising from the objection that deciding that the substituted section applied to existing tenancies would be to interfere with contracts made prior to the going into force of such amendment.

The right of the landlord to distrain the goods of a stranger was what may be called merely incidental to his right as a landlord and his right of distress for his rent, and in letting his premises it is not unfair to say that wherever such right, as well as any other right, existed at

law, he knew, or must be taken to have known, that it was within the bounds of possibility that by legislation such rights would be interfered with. By the 50th Vict. the Legislature, I think it must be assumed, declared that it would be unjust to permit the goods of one man to be taken to pay the debt of another, and by the Act of 1894 it further enlarged such declaration and extended the restriction which it had placed upon the right of a landlord by the 50th Vict. in the manner stated.

Judgment.
Rose, J.

It is clear law that in the construction of statutes remedial legislation must receive very liberal construction. Such principle is emphatically expressed in Endlich, sec. 107. I make the following extract:—"The object of this kind of statutes being to cure a weakness in the old law, to supply an omission, to enforce a right, or to redress a wrong, it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely, as the language used, when understood in its most extensive signification, would indicate."

In Maxwell on Statutes, 2nd ed., p. 84, we find as follows: "It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy; and the widest operation is therefore to be given to the enactment, so long as it does not go beyond its real object and scope." This is also made part of our statute law by sec. 8, sub-sec. 39, of the Interpretation Act, where every Act and every provision or enactment is declared to be deemed remedial and entitled to such a liberal construction as will best ensure the attainment of the object of the Act.

I do not think the argument of the respondents is without support from outside cases.

There is a class of cases submitted to us in argument on the principle that a statute is not retrospective in the sense under consideration, because a part of the requisites for its action is drawn from a time antecedent to its passing: see Maxwell, p. 264, and cases there cited. I particularly refer to *Page v. Bennett*, 2 Giff. 117, where it was held that the

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Rose, J.

Court had jurisdiction to relieve a party against a breach of covenant to insure committed after the date of the Act 22 & 23 Vict. ch. 35, arising on a lease dated before the passing of the Act. And to *Quilter v. Mapleson*, 9 Q. B. D. (C. A.) 672, where it was held that the Conveyancing and Law of Property Act, 1881, sec. 14, sub-sec. 2, was not confined to breaches taking place after the Act came into operation, but extended also to breaches committed before the Act, and to proceedings pending when the Act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that sub-section. See also *Duke of Devonshire v. Barrow Steel Co.*, 2 Q. B. D. 286, where it was held that sec. 8 of the Rating Act, 1874, 37 & 38 Vict. ch. 54, which provided that "Where any poor or other local rate, which at the commencement of this Act any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant, or license, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or re-adjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one-half of any such rate paid by him," applied to an existing lease under which there was a provision that the rent and royalties should be paid "free and clear of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature." Cockburn, C.J., said: "I agree that this clause, taken by itself, would have been quite sufficient to entitle the lessor to the payment of the rent and royalties in full, free from any deduction in respect of rates and taxes such as are therein enumerated, whether present or future; but we must look at it with reference to the provisions of the Rating Act, 1874. * * It is possible that this construction may operate contrary to the inten-

tion of the parties, but the Legislature has chosen to engraft upon existing contracts of demise a very plain enactment, and to this enactment we must give its proper effect."

Judgment.

Rose, J.

The statute of 1894 either applies to all tenancies created since 1887, or it applies only to tenancies created after 1894. If the latter, we should then have this inconsistency on the face of the statute, that certain sections of chapter 143, named in section 42, *i.e.*, 29, 30, and 31, would apply to tenancies created after October, 1887, while section 28, which was practically part of the same legislation, would be confined in its operation to tenancies created after the 5th May, 1894. In this view, it is not material to consider whether the amendment of 1894, apart from section 42, would not clearly apply to any right of distress arising after the 5th May, 1894, although incident to a tenancy created prior to such date, as, for instance, where the rent fell into arrear after such date, or where the goods were brought on the premises after such date, or where some fact or circumstance arose after the 5th May, 1894, which, if not existent, would have prevented the right of the landlord arising, or to determine whether or not the statute could in such a case be called retrospective, because a part of the requisites for its action was drawn from a time antecedent to its passing, and a part from a time subsequent to its passing.

In construing any Act found in the revised statutes, it must be remembered that, although the revised statutes are declared by sec. 9 of ch. 2 not to operate as new laws, but are to be construed and to have effect as a consolidation of the law contained in the Acts and parts of Acts repealed, and for which the revised statutes are substituted; it is also, in effect, declared by sub-secs. 2 and 3 of sec. 9 that the law as declared by the revised statutes is alone to prevail, for where the provisions of the revised statutes are not in effect the same as those repealed Acts and parts of Acts, for which they are substituted, then as respects all transactions, matters, and

Judgment. things subsequent to the time when the said revised statutes took effect, the provisions contained in them are to prevail, and only as respects all transactions, matters, and things anterior to the said time, are the provisions of the repealed Acts and parts of Acts to prevail. Therefore, in construing sec. 42, we need look at the language of such section only, for if it is the same in effect as that of the 50th Vict., of course it works no change, and if it is not the same then it is to prevail instead of the 50th Vict.

Rose, J.

I desire to base the conclusion at which I have arrived, upon the following propositions: (1) The legislation is remedial and must receive the most liberal construction so as to suppress the mischief aimed at, and advance the remedy desired to be given. (2) That by the plain language of sec. 42, as found in the revised statutes, the substituted section is made to refer to tenancies created after the 1st day of October, 1887, and there is nothing in the revised statutes, or in the 57th Vict., to require or justify the reading of sec. 43 otherwise than as plainly written. (3) Any other construction would work an inconsistency in the working out of the provisions of the Act.

I thus leave as an open question whether or not the statute of 1894 can be considered as retroactive, if it be confined to rights of distress arising after the 5th May, 1894, although incident to tenancies created before such date.

In my opinion, the appeal should be dismissed with costs.

ROBERTSON, J.:—

I concur.

E. B. B.

[QUEEN'S BENCH DIVISION.]

BAIN V. ANDERSON.

Master and Servant—General Hiring—Hiring for a Year—Question of Fact—Corporations—Implied Contract of Company.

The plaintiff having been for many years superintendent of a factory at a salary, was still under engagement for the current year when the factory and business were purchased by a joint stock company, the employment of the plaintiff continuing without further express agreement until after the expiration of the year, when he was dismissed on refusing to submit to a reduction of salary :—

Held, that whether the plaintiff's hiring at the time of his dismissal, was for a year or not, and whether it was terminable by written notice or not, both of which were questions of fact and not of law, no reasonable notice had been given in this case, and he was entitled to damages.

A general hiring is not necessarily to be considered a hiring for a year. The increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has modified the law as to contracts of trading corporations, so as to correspondingly increase their liability on implied contracts.

Finlay v. The Bristol and Exeter R. W. Co., 7 Exch. 409, considered.

ACTION brought by the plaintiff against Anderson and Statement.
the Anderson Furniture Company, for wrongful dismissal
under the circumstances mentioned in the judgment.

The action was tried on January 13th, 1896, before MEREDITH, C. J., without a jury, at the London Winter Assizes.

Gibbons, Q. C., for the plaintiff.

Osler, Q. C., and W. T. McMullen, for the defendants,
cited *Baxter v. Nurse*, 6 M. & Gr. 935 ; *Rettinger v. Macdougall*, 9 C. P. 485 ; *Lowe v. Walter*, 8 Times L. R. 358 ;
Finlay v. The Bristol and Exeter R. W. Co., 7 Ex. 409.

February 29th, 1896. MEREDITH, C. J. :—

At the close of the argument, I found, among others, the following facts to be established by the evidence ; that the plaintiff who had been in the employment of the James Hay Company, limited, as superintendent of the

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**Meredith,
C.J.**

company's factory at a salary of \$1,500 per annum for many years, and who was then under an engagement with it for a year, ending July 31st, 1895, was, on May 18th, 1895, employed by the defendant Anderson, who had become the purchaser of the business and assets of the defendant company, for the remainder of the then current year of his engagement, at the same salary that he was then receiving; that the plaintiff continued in the service of Anderson and of the defendant company till the year expired, and after the expiration of it, in the employment of the defendant company, which was formed on July 26th, 1895, to take over the business and assets of the Hay Company from the defendant Anderson, until August 23rd, 1895; that no new express agreement was come to as to the terms upon which he continued in his employment; and that up to that date he was paid by the defendant company his salary or wages at the rate of \$1,500 per annum; and that on August 23rd, 1895, the defendant company gave him notice that after the following Saturday, his salary would be reduced to \$600 a year; that the plaintiff continued in the service of the defendant company until September 23rd, following; but that he did so relying upon his right to be paid at the rate of \$1,500 a year, and denying the right of the defendant company to reduce his salary; and that he was finally discharged on September 23rd, 1895, on account of his persisting in his contention that he was within his legal right in taking that position; and I reserved for further consideration the question of the effect of these findings, and of the right of the plaintiff to recover for a wrongful dismissal.

Before dealing with these questions, I now find as a further fact that if the defendant company was entitled to put an end to the plaintiff's engagement during the currency of the year which he entered upon on July 31st, 1895, by reasonable notice of its intention to do so, the notice given was not a reasonable one.

It was contended by the plaintiff that as the hiring, as I

have found it, was an indefinite hiring at an annual salary, it was by law a hiring for a year, and that the employers were not at liberty to put an end to it before the expiration of the year.

Judgment.
Meredith,
C.J.

This contention certainly finds support from the statement of the law on the subject in the text books. See Smith's Master and Servant, 4th ed., p. 84, where it is thus dealt with: "Where no time is limited, either expressly or by implication, for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and in point of law a hiring for a year. This rule is applicable to all contracts of hiring and service, whether written or unwritten, whether express or implied, and whatever be the nature of the service."

The statement in the text is borne out by the earlier cases and by the expressions of opinion of many Judges; and in *Rettinger v. McDougall*, 9 C. P., at p. 487, Draper, C. J., said: "The doctrine that a general hiring is (in the absence of anything to qualify it) a hiring for a year, is clearly settled by *Fawcett v. Cash*, 5 B. & Ad. 904, and *Beeston v. Collyer*, 4 Bing. 309; and there is nothing in *Baxter v. Nurse*, 6 M. & Gr. 935, conflicting with that doctrine."

The more modern cases have, I think, modified the law as stated by the learned Chief Justice, and it is now pretty well settled that, at all events, as to many kinds of service there is no inflexible rule that an indefinite hiring is a hiring for a year, but that the question is one of fact to be determined according to the circumstances of each particular case; and that in the absence of anything to qualify it, a jury may properly find as an inference of fact that the hiring is a yearly one: Taylor on Evidence, 9th ed., par. 177, p. 153; *Green v. Wright*, 1 C. P. D., at 595.

The recent cases seem also to shew—some of them at least—that it is also a question of fact whether such a contract of hiring is not subject to be put an end to by reasonable notice to be given by either of the parties to it, and as to what in the particular case is reasonable notice:

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C.J.

Taylor on Evidence, 9th ed., par. 177; *Green v. Wright*, *supra*; *Lowe v. Walter*, 8 Times L. R. 358; but it is unnecessary to consider what the law with regard to that is, because I have in this case found that if the proper conclusion, whether it is one of law or of fact, be that the contract of hiring was subject to being put an end to in that way, no such notice was given by the defendant company to the plaintiff.

It was contended by the defendants that, even if upon the facts of this case, a private person being the employer would have been liable to an action for wrongful dismissal, the defendant company being a company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, cannot be made liable upon a contract inferred from the conduct of the parties, and *Finlay v. The Bristol and Exeter R. W. Co.*, 7 Ex. 409, was relied on in support of that contention.

It was held in that case that the defendants who were an incorporated railway company, and had agreed by parol to take certain premises for a year—had occupied for the year, and continued to occupy for another year at the expiration of which they, without giving notice to quit, removed their goods and paid the rent up to the end of the following quarter,—were not liable to an action for use and occupation for the remaining three quarters of the year, since they did not occupy during that period, and that no tenancy could be inferred from the payment of rent, inasmuch as they could not contract except under seal.

At the time that case was decided the exceptions to the common law rule as to the liability upon contracts of corporations were very limited. These exceptions were based upon the principle of convenience almost amounting to necessity, and applied to small matters of daily occurrence such as the hiring of household servants and the like, but the vast increase in the extent, importance and variety of corporate dealings which has taken place in modern times, has led to a corresponding increase of the exceptions: Pollock on Contracts, 5th ed., p. 145.

Although the exceptions recognized when the *Finlay* case was decided were limited, the principle applied did not differ from that which formed the ground of the more recent decisions; the application of that principle was necessarily elastic and the increase to which Sir Frederick Pollock refers in the extent, importance and variety of corporate dealings rendered many things which in earlier times might not have been so convenient as to be almost necessary, to be so now.

Judgment.
Meredith,
C.J.

In *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, where the authorities are referred to and considered, Bovill, C.J., said, referring to the exceptions now recognized: "These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, managers and others; and if the contracts made by these persons are contracts which relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain the argument."

That view of the law was held to be correct and the judgment to which it led was affirmed on appeal without hearing counsel for the respondents: *S. C.*, L. R. 4 C. P. 617.

The result of this case is, I think, to overrule the *Finlay* case, or, at all events, to justify me in treating it as no longer applicable to a modern trading corporation, such as the defendant company in this case is: see Pollock on Contracts, 5th ed., p. 148.

I am unable to see that any sound reason exists for holding that an express agreement will bind, but that one which is inferred from the conduct of the parties will not. Every argument of convenience seems to justify me in treating such an agreement as I have found to exist in this case, as within the exceptions to the general rule

Judgment referred to, and the reasons upon which those exceptions were founded.

Meredith,
C.J.

I venture to think that in many cases the nature of the contracts of hiring of the employees of the large manufacturing and other trading establishments carried on by incorporated companies, must depend upon inferences to be drawn from the acts and conduct of the employer and the employed, and to hold that the liberal rule applied in the modern cases, has no application to such contracts, would be productive of very great inconvenience, and in the absence of authority requiring me to do so, I am not content, so far as my decision can do it, to inflict that burden upon the commercial community and its employees.

The provisions of section 59 of the Ontario Joint Stock Companies Letters Patent Act, R. S. O. 1887, ch. 157, are in accord with this modern view as to contracts of trading corporations; and in a recent case (*Ontario Western Lumber Co. v. Citizens Telephone and Electric Co.**), I held that where there was nothing appearing in the evidence to lead to a contrary conclusion, I was justified in finding as a fact that a contract entered into by the manager of a trading company in the name of his company for purposes for which the company was incorporated, was entered into in general accordance with his powers as such under the by-laws of the company, and therefore binding on the company. That was, it is true, the case of a written contract not under seal, but I see no reason why the section should not be held to apply to a parol contract. That it does so apply, has been held by the Court of Queen's Bench of Manitoba sitting in appeal in the case of *McEdwards v. The Ogilvie Milling Co.*, 4 Man. 1, which was decided upon provisions of a Manitoba statute, similar in its terms to section 59: (Con. Stat. Man. ch. 9, div. 7, sec. 269.)

*Noted 32 C. L. J. 237. An appeal in this case was argued before the Divisional Court on February 27th, 1896, and stands for judgment. RRP.

The plaintiff's dismissal was, therefore, in my opinion, wrongful, and he is entitled to recover from the defendant company such damages as he has sustained by reason of it. These damages I assess at \$408.36. I arrive at that amount by allowing wages at the rate of \$1,500 a year from August 23rd, 1895, to December 1st following, when the plaintiff began business on his own account. He is not entitled to anything after that date, as it is impossible for me to say that any loss has been sustained by him since he has been in business, although he says that the profits of the business if wound up would be less than his wages at the rate of \$1,500 a year for the remainder of the year of his engagement with the defendant company; that may well be so, and yet he may be in a better position financially than he would have been in had he remained in the service of the defendant company, as he has been engaged in laying the foundation of a business, which, though it has as yet given only a moderate return, may in the end turn out a profitable one.

There must be judgment for the plaintiff against the defendant company for \$408.36, with full costs of suit, and the action will be dismissed as against the defendant Anderson without costs, but the dismissal as against him, is not to disentitle the plaintiff to his full costs except so far as they have been increased by adding him as a defendant.

A. H. F. L.

Judgment.

Meredith,
C.J.

[DIVISIONAL COURT.]

DENNIS V. HOOVER.

Tenant for Life and Remainderman—Rent—Apportionment.

A tenant for life who had leased the premises of which she was life tenant, died a few days after a half year's rent, which was payable in advance, became due. On the day of her death part of the rent was remitted to her and was received by her executor, to whom the balance was paid on the representation that he was entitled to it:—

Held, that the rent was received by the executor for the use of those entitled to it, and was therefore apportionable between the executor and the remainderman, who had confirmed the possession of the tenant, and that the executor was entitled to an order for repayment by persons, third parties, claiming under the will to whom he had paid it.

Statement.

THIS was an appeal by the defendant from the judgment of the junior Judge of the county of York.

The action was brought by George Dennis, a lessee of the tenant for life, under the will of Peter Kurtz, who died on the 18th of February, 1858, and Jacob Kurtz, trustee under the will.

Peter Kurtz by his will devised certain lands to his wife Mary Ann Kurtz for her life, and after her death to trustees upon the trusts named therein. On the 21st of December, 1881, the widow leased the lands to the plaintiff George Dennis for five years from the 1st of April, 1882, at the yearly rent of \$300, payable half-yearly in advance, on the 1st of April and November in each year during the term, and on the expiration thereof, the term was extended for a further term of five years, and on the expiration thereof, was continued on from year to year, on the terms and conditions contained in the original lease. The widow died on the 6th of April, 1895, and by her last will and testament, appointed the defendant her executor. The half year's rent payable in advance for the half year beginning on the 1st of April, 1895, and ending on the 1st day of October, 1895, was paid as follows: \$100 was remitted by post office order to the widow, which arrived on the day of her death, and was not received by her in her lifetime, and was taken over by the defendant as her execu-

tor, and the balance, \$50, was paid to the defendant on demand made by him on the representation that as executor he was legally entitled to it. Statement.

The plaintiffs claimed that the \$100 was paid under a mistake of fact, in not knowing at the time of the widow's death; and the balance under the mistake that the defendant was entitled to receive it.

The parties to whom the executor had paid over the moneys, were made third parties to the action.

The learned Judge at the trial found for the plaintiffs for \$145, after apportioning the amount, namely, \$5, which he found to be due to the defendant as executor of the widow's estate. He also found that the defendant had not made any case against the third parties; but he stated that their counsel had consented on their behalf to repay to the defendant the amounts which had been paid over to them.

The appeal came on for hearing before a Divisional Court, composed of BOYD, C., FERGUSON, and MEREDITH, JJ. *McCulloch*, for the defendant, the executor.

D. C. Ross, and *J. Nason*, for the third parties.

J. W. St. John, for the plaintiffs.

February 19th, 1896. BOYD, C. :—

The payment in advance in this case, was the equivalent for six months enjoyment of the premises leased: *Buckley v. Taylor*, 2 T. R. 600. But the lessor, being only tenant for life, could not secure the enjoyment of the land to the tenant after her death, which happened within a few days after the commencement of the six months; and it is against equity that the executor of the life tenant should retain all the money paid for rent; in one aspect he is trustee of the part apportionable to the residue of the six months for the remainderman in whom the land vested at the death of the life tenant; that person being the surviving trustee of the original owner. Peter Kurtz is a co-plaintiff, and he has assented to the continuance of the

Judgment. term which was interrupted by the death of the life tenant. That being so, the authorities shew that the rent received by the executor of the deceased lessor, is held to the use of the person who, as reversioner, can assure possession to the tenant.

Boyd, C.

Such is the result of the doctrine enunciated in a case the converse of this where the life tenant having died during the term, the whole of the rent was paid to another who succeeded to the land. It was held that part of the rent so paid, was held to the use of the prior landlord for that part of the term during which there had been enjoyment under him: *Hawkins v. Kelly*, 8 Ves. 308. And in *Aynsley v. Wordsworth*, 2 Ves. & B. 331, Sir T. Plumer, V. C., lays down this principle in the case of a tenant who submits to pay rent, at p. 334: "That upon payment, from a conscientious motive, by a person not obliged to pay in respect of a lease expired, a right arises to take from the person receiving the payment a portion to which he was not entitled": see *Paget v. Gee*, Ambl. 198, 200.

This case is in essence just the same as if the whole six months' rent had been paid on the first day of the term in advance to the landlord, and then the landlord (being no more than a life tenant) had died thereafter on the same day, his estate would hold the rent either for the use of the reversioner who gives the actual enjoyment of the land, or to the use of the tenant as upon a consideration that had failed, or *pro tanto* failed.

The judgment of the Court below should be affirmed with costs.

MEREDITH, J. :—

The one remaining question upon this appeal is, whether the defendant can retain the fifty dollars paid to him, upon the ground that it was a voluntary payment, made with a knowledge of the facts. The other grounds of the appeal were disposed of upon the argument; Mr. McCullough eventually contending only for a reduction of the amount of the judgment by this sum, and so to bring the claim within the jurisdiction of the Division Court.

But the evidence shews that this payment was really made Judgment.
for the use of the person legally entitled to it. The de- Meredith, J.
fendant was merely the legal representative of the life
tenant; he had no personal interest in the matter; no
right or pretence of right to the money for his own use.
The whole of the rent had become payable to the tenant
for life before her death; it was recoverable by her; but
being payable in advance, and being but a return for
the use and enjoyment of the land, and now accruing from
day to day and apportionable, her estate was beneficially
entitled rightfully to rent for the few days of the then cur-
rent six months which had passed before her death.

The defendant and the tenant were in doubt as to the
proper person to whom the payment should be made, not,
perhaps, an unreasonable doubt, seeing that the whole rent
had become payable before the death of the life tenant; and
it seems to me plain enough that both parties meant that
only the person beneficially entitled to it should even-
tually have the money.

In these circumstances, and upon the whole evidence, I
have no doubt the money was really paid to and received
by the defendant for the use of the person beneficially
entitled, and that is the remainderman, who is one of the
plaintiffs, and who assented to the continued occupancy
of the lands, after the falling in of the life estate, on the
same terms as those of the prior tenancy.

The case is not, of course, one of payment from a mere
conscientious motive, for here the tenant was legally liable
to pay the rent to some one.

As to the third parties, each should repay the defendant
the amount received from him, and he should have judg-
ment for such repayment; but there should be no order
as to costs in this respect; the third parties were always
willing to repay, and the claim against each is the subject
of a Division Court action only.

The appeal, in all other respects, should be dismissed.

FERGUSON, J., concurred.

G. F. H.

[CHANCERY DIVISION.]

ATTORNEY-GENERAL V. CAMERON.

Revenue—Succession Duty Act—Present and Future Interests—Duty Payable—Annuity.

Where a testator divides up his estate so as to create present and future estates or interests, the duty under the Succession Duty Act, 1892, 55 Vict. ch. 6 (O.), is to be assessed on the whole estate at the time of his death, including both the present and future estates or interests, but duty is only payable at the death or within eighteen months thereafter on the present estates or interests; the payment of duty on the future estates being deferred until they become estates in possession or enjoyment, and the duty then payable is not the duty fixed at the time of the death, but that assessed upon the value of such estates or interests at the time the right of possession or enjoyment accrues.

In computing the duty on an annuity payable on a testator's death, and of which there is present actual enjoyment, the duty thereon must be assessed on its then cash value; on a deferred annuity, duty is payable when the right to enjoy it commences.

Duty is also payable on the capital producing an annuity, when it becomes distributable as legacies or as part of the final distribution of the estate.

Statement. THIS was a special case stated for the opinion of the Court in an action brought by the Attorney-General for Ontario against the executors of the will of one Alexander Cameron for the purpose of ascertaining the amount of succession duty payable under the Succession Duty Act 55 Vict. ch. 6 (O.).

The case stated was as follows:—

1. Alexander Cameron, late of the city of Toronto, in the county of York, Esquire, deceased, departed this life on or about the 15th day of May, A. D. 1893, having first duly made his last will and testament, bearing date the 12th day of May, A. D. 1893, and a codicil thereto, bearing the same date.

2. By the said will he appointed the defendants Cameron and Curry, and one Thomas R. Lyon, his executors and trustees; and by his said codicil, he appointed the defendant Armour an executor and trustee in case the said Lyon should renounce.

3. The said Lyon renounced and disclaimed the offices of executor and trustee under the said will, and thereafter

and on the 30th day of November, A.D. 1893, probate of the said will was granted by the proper court to the defendants. Statement.

4. The amount of property left by the testator was valued at the sum of \$556,069.67, for the purposes of probate, and consisted of lands, mortgages, stocks, agreements for sale of lands, held by him and by the defendants as vendors, cash, and a share in the banking business of Cameron & Curry. And the testator had no future estates or interests in land, remainders or reversions.

5. By the said will and codicil, the said testator devised and bequeathed all his property to which he should die entitled, to the defendants in trust for sale, with power in the meanwhile and until sales should be effected to lease the real estate for terms not exceeding ten years; to improve real estate by building, and with other powers for improving his said real estate till it should be sold.

6. Out of the proceeds of the sales of the estate and the accumulations of capital and income not required for expenses of management and payment of annuities, the testator directed the defendants to form a fund, and out of the income of the estate growing at the time of his death, and of the said fund when formed, he directed the defendants to pay the following annuities, namely, to each of his two daughters \$2,500 a year for life; and to his son \$3,000 a year for his life; being a total of \$8,000 a year. He also bequeathed to several employees of Cameron & Curry, bankers, small sums should they be in that employment, every Christmas. To Mrs. S. N. Ross, by his codicil, he bequeathed \$150 per annum during her life. He further bequeathed to the trustees for his grandchild, Katie Torrance, the only child of his daughter, Mrs. Torrance, a sum not exceeding \$500 per annum, for the support, maintenance and education, until she attained twenty-one years of age or married, which ever first should happen, upon her marriage \$2,000, and upon attaining twenty-one \$15,000. He further bequeathed to the trustees for his two grandchildren, sons of his daughter, Mrs. Cartwright, sums not exceed-

Statement. ing \$500 each, for their support, maintenance and education until twenty-one years of age; upon attaining twenty-one, the sum of \$15,000 each, and at marriage \$2,000 each. He made the same provision for any children that his son, the defendant Cameron, should have, but the said defendant Cameron has no children.

7. At the expiration of twenty-one years from the death of the said testator, he directed the defendants, after setting apart an amount sufficient at four per cent. per annum to produce the annual payments directed to be made, to divide his estate into three parts, to be called the Torrance, Cartwright and Cameron shares, and taking into account payments already then made, the said shares, with such payments should be equal, and the said shares are to be paid or conveyed, one to his grandchild Torrance, or her issue; one to his grandchildren Cartwright, or their issue; and one to his grandchild or children Cameron, if any. If any grandchildren of any family failed, the share to be divided by his executors and trustees among his children and grandchildren, as they should think best. And the capital set apart to produce the annuities, was also directed to be so distributed as it fell in, and was released from such annual payments.

8. The said will contained other matters not necessary for the decision of the matters in question herein.

9. The plaintiff alleged that the whole capital sum of the said estate was, at the time of the death of the said testator, and now is, subject to succession duty to be computed thereon, and to be paid forthwith in full satisfaction of the succession duty due to the Crown.

10. The defendants, while admitting that succession duty is payable on the said estate on account of the amount thereof, deny that duty is to be computed on the whole capital amount and paid forthwith, but allege that the only duty payable at present, is a duty upon the cash values of the annuities payable under the said will, and that the duty on all other legacies, including the final distribution, the payment of which is postponed, was to be

computed and paid upon them at the time of their becoming payable and at the time of distribution respectively, that is to say, when they should actually fall into possession, and not before. Statement.

11. If the Court shall be of opinion that succession duty should be paid on the annuities only at the present time then the plaintiff alleges that it should be computed upon them upon a basis of five per centum, and the defendants allege that the five per centum basis is applicable only to future and contingent estates and interests and not to annuities, and that the actual cash value of the annuities herein, or in other words, what they could be sold for in the market, having regard to the age, state of health, value of money, and other circumstances affecting the same, is the proper basis for computation, and that the duty should be levied upon such actual cash value only.

On March 6th, 1896, the case was argued before ROSE, J.

J. R. Cartwright, Q.C., and *A. H. Dymond*, for the Attorney-General. The first question is whether succession duty is payable on an estate or any portion thereof, where the possession is deferred for a number of years? The policy of the Act is that the succession duty should be payable on the whole estate. Section 4 shews that the whole property passing on the death of the testator or intestate shall be liable to succession duty; and by section 12 such duty is payable at the death of the testator or intestate, or within eighteen months thereafter. Section 5 provides for the executor or administrator filing with the Surrogate Court Clerk an inventory and market value of the estate and the several persons to whom it will pass, the relation in which they stand to the deceased and the value of the property liable to succession duty. Sections 6 and 7 provide for the valuation by the sheriff, if the Provincial Treasurer is dissatisfied with the executors or administrators' valuation. Then comes section 8, which provides for

Argument. the assessing of all the property liable to duty. The words in the section are most general and their terms clearly include as well property of which the immediate possession is given as well as where the possession is deferred. The defendants rely on section 11 as shewing that the duty on future estates is not to be payable until the estates actually come into the possession of the persons entitled thereto. This is not the effect of that section; the estates to which it refers are not those which the testator owned at the time of his death, but to which he had a right in expectancy, and which, in the natural course of things, would go to his heirs. The next point is, that if the only duty payable is a duty payable on the annuities, then such duty is to be computed on a five per cent. basis.

E. D. Armour, Q.C., contra. The Act, 55 Vict. ch. 6 (O.), is, as its title points out, an Act for the payment of succession duty, and the policy of the Act is that the person who succeeds to the property or legacy, is to pay the duty. Thus in section 4 the Act speaks of the duty being payable by the person who shall become beneficially entitled in possession or expectancy to any property. In section 5, by the several persons to whom the property is to pass. See also sections 10, 13, 14 and 18. Thus, all through the Act we see that it is the legatee who is to pay the duty and not the estate. It then becomes necessary to see when the legatee is to pay the duty. Section 8 provides for the fixing of the cash value of all estates, interests, annuities, or real estates or terms of years growing out of the estate and the duty to which the same is liable. This section must be read in connection with section 11, and so reading it, it is quite apparent that future estates are only to pay duty when they come into the possession of the persons entitled thereto. Section 11 is not limited to estates which are not created by the testator, but includes all future estates. Legatees, therefore, only pay duty when the estates devised to them come into their possession, subject to the deduction of any present duty which has been paid. To harmonize sections 8 and 11, the whole estate must be

valued; the value of the annuities must be first ascertained Argument. and then the value of the legacies, after taking into account the value of the annuities; but the duty on the legacies is not to be payable until they become estates in possession. Then as to the mode of fixing the duty payable on the annuities. The duty payable on the annuities is the cash value of the annuities at the time of the death of the testator. He referred to *Kennedy v. Protestant Orphans' Home*, 25 O. R. 325; *Hales v. Freeman*, 1 Bro. & B. 391; *Crow v. Johnston*, 4 DeG. F. & J. 337; *Attorney-General v. Earl of Sefton*, 11 H. L. Cas. 25; Dos Passos on Succession Duty, 2nd ed., pp. 427, 285, 320, 321.

March 18th, 1896. ROSE, J.:—

The answer to the questions submitted for the opinion of the Court all depend upon the proper construction to be placed upon the Succession Duty Act, 1892, 55 Vict. ch. 6 (O.).

By section 4 it is enacted that save as is provided by the previous sections, "All property situate within this Province, where the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death, or had been so domiciled in Ontario within five years previous thereto, * * shall be subject to a succession duty to be paid for the use of the Province over and above the fees provided by the Surrogate Courts Act."

By section 12 it is provided that "The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, or within eighteen months thereafter." Provision is further made for payment of interest if not paid within the eighteen months, and the duties, with interest thereon, are declared to be a lien on the property in respect to which they are payable until the same are paid.

By section 5 an executor or administrator is required to file with the surrogate registrar under oath, a full, true and correct statement shewing (a) a full itemized inven-

Judgment.
Rose, J.

tory of all the property of the deceased person, and the market value thereof. (b) The several persons to whom the same will pass under the will or intestacy, and the degree of relationship, if any, in which they stand to the deceased.

By the sub-sections of section 4 the duty upon the property so valued is fixed.

In a simple case these provisions can be worked out without difficulty, but as appears from section 8 the mode of assessing the property and fixing the duty differs where there are estates, interests, annuities and life estates, or terms of years growing out of the estate, which may be called present estates, and where the estates, etc., are what may be called future estates.

By an oversight, section 8 is not made to apply to every case, but is apparently, in terms, confined to cases arising under section 6, which provides that where the treasurer of the Province is not satisfied with the value sworn to by the executor or administrator, the sheriff of the county under proper direction, shall make a valuation and appraisalment. Section 8 then provides that the surrogate registrar shall upon receiving the report of the sheriff forthwith assess and fix the then cash value of all estates, interests, annuities and life estates, or terms of years growing out of such estate, and the duty to which the same is liable, and the value of every future or contingent or limited estate, income or interest for the purpose of the Act, is to be determined by the rule, method and standard of mortality and of value, which are employed by the provincial inspector of insurance in ascertaining the value of policies of life insurance and annuities for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum. This section deals with what I have called present estates and future estates.

I was requested by counsel to answer the questions submitted in the case stated without regard to the fact that

in this case the treasurer of the Province had not expressed dissatisfaction with the value sworn to by the executors, and that it had not been referred to the sheriff to fix the value.

Judgment.
Rose, J.

Section 8 is by itself not difficult to understand. Whatever difficulties there may be in working out its provisions, I have not to consider. As to all estates the surrogate registrar is to assess and fix the "then cash value," and the duty to which the same is liable. As to future estates the "present value" is to be ascertained in the mode above pointed out. I do not see that any difference is intended between "present value" and the "then cash value."

If there were no other provision of the statute it would be reasonably clear that having regard to the provisions of section 12 the duty fixed upon such values both as to the present and future estates would be due and payable at the death of the deceased, or within eighteen months thereafter; but by section 11 it is provided that, "In all cases where there has been a devise, descent or bequest of property liable to succession duty, to take effect in possession, or come into actual enjoyment after the expiration of one or more life estates or a period of years, the duty on such future estate or interest shall not be payable nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate or interest, by the determination of the estates for life or years, and the duty shall be assessed upon the value of the estate or interest at the time the right of possession accrues as aforesaid."

The principle of that section seems, by itself, clear enough, viz., that the succession duty is to be paid by the person who takes the estate, but not until he is entitled to possession or actual enjoyment; and further that such duty is to be "assessed upon the value of the estate or interest at the time the right of possession accrues as aforesaid." As to present estates of course no difficulty arises. As to future estates there is an apparent conflict between the provisions of sections 8 and 11.

Judgment.

Rose, J.

I have come to the conclusion that sections 8 and 11 may be read together in this wise. By section 8 the surrogate registrar is required to assess and fix the then cash value of all estates, interests, annuities and life estates or terms of years growing out of such estate, and the duty to which the same is liable, and such duty is made payable forthwith.

Where the property which a deceased person owns or is entitled to at the time of his death passes to another who is by the terms of the devise or by descent entitled to immediate possession or enjoyment of such estate, as I have pointed out, the mode of ascertaining the duty to be payable in respect thereof by the person so taking such estate, is provided by section 4. It is manifest that where, for instance, the testator, instead of sending the estate to some person who is to have immediate possession or enjoyment, carves out, say an estate for years, an estate for life, and an estate in fee simple in remainder, the sum of the duties fixed upon the various estates, if fixed at the time of the death of the testator, should equal the duty which would have been payable had the estate not been divided up. Therefore the surrogate registrar in order to ascertain the cash value of, say the estate for years, should determine the then cash value of the estate for life, and the then cash value of the estate in remainder, and so section 8 provides the duty in respect to the estate for years would by the terms of section 12 be forthwith payable. The duty in respect to the estate for life and the estate in remainder would not be payable until the persons entitled thereto would come into actual possession thereof. As by the Act no interest is payable in respect to duty which becomes payable when the future estate becomes as an estate in possession, section 12 provides in effect that, notwithstanding the provisions of section 8, and notwithstanding the ascertainment of the cash value of the future estate at the time of the death of testator, the duty payable in respect to such estate is not to be that which is fixed under the provisions of section 8, but is that which is to be ascer-

tained by assessing the same upon the value of the estate or interest at the time the right of possession accrues. This may be in lieu of interest. So that in the practical working out the surrogate registrar will assess and fix the "then cash value" of the present estates, and will assess and fix the "present value" of all future estates. The duty in respect to the present estates is payable forthwith or within eighteen months of the death. The duty in respect to the future estates is to be payable when such future estates become estates in possession or enjoyment; but when such future estates become estates in possession or enjoyment, the duty payable in respect to the same is not to be the duty fixed by the surrogate registrar under section 8, but is to be the duty assessed upon the value of such estate or interest at the time the right of possession or enjoyment accrues. It may be said that this is an arbitrary reading of the two sections. I think any interpretation must in a sense be arbitrary, because I doubt very much if in drawing section 11 the full effect and meaning of the provisions of section 8 were in mind. Of course if it is impossible to reconcile the provisions of these sections then by the ordinary rule governing the interpretation of statutes, the provisions of the later section must prevail over those of the earlier. If the provisions of section 11 are in conflict with those of section 8, and are to be taken to override them, the result would be practically the same, for in such case section 8 would simply provide for ascertaining the cash value of the present estates, and would give no direction as to ascertaining the value and fixing the duty in respect to future estates.

I think that what I have said answers the questions submitted for the opinion of the Court. I therefore answer such questions as follows:—

Question 1. Is the whole capital sum left by the testator subject to duty payable forthwith in satisfaction of all succession duty payable to the Crown? Answer. No.

Question 2. Or is the only duty payable forthwith a duty on the value of the annuities, and is the computation

Judgment.

Rose, J.

Judgment.

Rose, J.

and payment of the duty on the other legacies and the capital sum postponed until the payment and distribution of each legacy or part respectively, that is to say, when the legatees respectively actually receive them in possession? Answer. The duties on present estates are due and payable at the death of the testator or within eighteen months thereafter. The duties on future estates when they take effect in possession or come into actual enjoyment.

Question 3. If duty is payable and paid on the value of the annuities only at present, will duty be subsequently payable on the capital producing such annuities when it becomes distributable in legacies, or as part of the final distribution of the estate? Answer. Yes.

Question 4. If duty is payable on the annuities is it to be computed on the actual cash value at the time of the death of the testator, or upon the value calculated at five per centum per annum, or is the duty to be determined by the rule, method and standard of mortality and of value employed by the provincial inspector of insurance in ascertaining the value of policies of life insurance and annuities for the determination of the liabilities of life insurance companies? Answer. Duties on annuities payable immediately are to be assessed on the cash value at the date of the testator's death. The duties on deferred annuities are to be assessed upon their value at the time the right of possession accrues.

G. F. H.

[DIVISIONAL COURT.]

THIBAudeau V. GARLAND.

Assignments and Preferences—Purchase of Debt before Assignment—Knowledge of Insolvency—Right of Set-off.

Before an assignment for the benefit of his creditors, a person indebted to the assignor, and who was aware of his insolvency, purchased from a creditor of the insolvent a debt due to the former by the latter, which the purchaser claimed to set-off against his debt to the insolvent :—
Held, that under R. S. O. ch. 124, sec. 23, in connection with the general law of set-off, he was entitled to do so.

THIS was an action brought by the plaintiffs, Thibaudeau Bros., on behalf of themselves and the other creditors of Clinton S. Herbert, to set aside the sale made by him to the defendants Garland and Jenkins, of his stock of goods, as being void against the said creditors by reason of its having been made with knowledge of the insolvency of Herbert, and with intent to defraud the said creditors; and also to recover the sum of \$750, a debt due by Herbert to Alexander & Anderson, which Garland and Jenkins purchased for the sum of \$420, the defendants Garland and Jenkins being aware at the time of the purchase of Herbert's insolvency and that he had absconded, but before any assignment for the benefit of creditors had been made, and which the defendants retained, claiming to be entitled to set it off against the balance of the purchase money due on their purchase from Herbert. The sale to the defendants took place on the 29th January, and this action was commenced on the following day, when an interim injunction was obtained, but was dissolved on the 31st. The claim was purchased by the defendants from Alexander & Anderson about two hours before they were notified of the injunction having been granted. Herbert subsequently made an assignment for the benefit of creditors, and the assignee was added as a co-plaintiff. Statement.

The action was tried at Toronto, before MACMAHON, J., at the Autumn non-jury sittings, 1895.

Statement. The learned Judge found for the defendants and dismissed the action.

The only part of his judgment material to this report is as to the right of set-off:—

MACMAHON, J.—“ * * The other point is as to the account purchased by Garland from Alexander and Anderson two hours before he had notice of the injunction being granted.

At the time the purchase was made, the relationship existing between Garland and Herbert, was that of ordinary debtor and creditor. Had Herbert demanded payment of the balance due him an hour after the claim was purchased, Garland could have set off the amount of the account against Herbert's claim on him. It makes no difference, so long as it was a valid indebtedness against Herbert, what consideration was paid for it, for had Alexander and Anderson assigned it without receiving any consideration, Garland would have been entitled to set it off for the full amount.

Under the English Bankruptcy Act, a debtor of the bankrupt was not allowed to set off a bill or note endorsed, or a debt transferred to him after the date of the receiving order: Robson on Bankruptcy, 7th ed., 367; *Dickson v. Evans*, 6 T. R. 67; *Re Milan Tramways Co., Ex p. Theys*, 25 Ch. D. 587; *Re Gillespie, Ex p. Reid*, 14 Q. B. D. 963. But he could set off any such claim purchased before the date of the receiving order.

Under our Mercantile Amendment Act, R. S. O. ch. 122, sec. 6 *et seq.*, any debt assigned can be set off.

The 23rd section of the Assignments and Preferences Act, R. S. O. ch. 124, does not help the plaintiffs.

As to set off under the Winding-up Act, see *Re Central Bank and Yorke*, 15 O. R. 625; *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

The plaintiffs moved on notice to set aside the judgment as to the right of set-off, and to have the judgment as to it entered in their favour.

On 19th February, 1896, before a Divisional Court, Argument.
composed of BOYD, C., FERGUSON, and MEREDITH, JJ.,
McCarthy, Q. C., supported the motion. There was no right
of set-off here. The English cases shew that there is no such
right after an act of bankruptcy has been committed, and
after the party attempting to assert the set-off has acquired
notice of it. In *Vernon v. Hankey*, 2 T. R. 113, it was
held that a bankrupt, after receiving notice of an act of
bankruptcy, was not justified in paying the drafts of a
person who had placed money in his hands; and in
Dickson v. Evans, 6 T. R. 57, that a person could not set
off cash notes issued by a bankrupt before his bankruptcy
unless he could shew that the notes came to his hands
before the bankruptcy. The case of *Re Gillespie, Ex p.*
Reid, 14 Q. B. D. 963, lays down that the right of set-
off exists only where there are mutual dealings, and
there can be no mutual dealings after the commencement
of the bankruptcy. The line is drawn at the act of bank-
ruptcy. When, therefore, the act of bankruptcy becomes
known, no right of set-off exists. See also *Re Milan*
Tramway Co., Ex p. Theys, 25 Ch. D. 587, 591; Robson
on Bankruptcy, 7th ed., 367. The learned Judge at the
trial seemed to think that the line was drawn from the
date of the receiving order; and so by analogy was from
the date of the assignment for the benefit of creditors,
and that the cases under the English Bankruptcy Act
justified this conclusion; but section 38 of the English
Bankruptcy Act of 1883, 46 & 47 Vict. ch. 52, expressly
provides that a person shall not under that section be en-
titled to claim the benefit of any set-off against the prop-
erty of a debtor, where at the time of giving credit to
the debtor he had notice of an act of bankruptcy: Rob-
son on Bankruptcy, 7th ed., pp. 887 and 927. The right
of set-off here depends upon section 23 of R. S. O. ch. 124.
That section expressly provides that any claim for set-off
shall be subject to the provisions of the Assignment Act or
any other Act respecting frauds and fraudulent preferences.
To allow the set-off would be a fraud within the pro-

Argument. visions of the Act; but, apart from the Act, it would not be in accordance with the equity or good conscience, as tending to defeat an equitable distribution of the assets amongst the creditors generally, and so enabling a debtor to give a preference to such of his creditors as he might be disposed to benefit: *Smith v. Hill*, 8 Gray, Mass., 572, 574; Edgar's Insolvent Act, p. 175. The learned Judge has confused an expression in Robson on Bankruptcy, p. 367, as to the effect of the receiving order.

Ritchie, Q. C., and Masten, contra. The evidence shews that the purchase from Alexander & Anderson was before any injunction was granted, or any proceedings taken attacking the sale from the insolvent to defendants. At the time the defendants purchased the claim from Alexander & Anderson, the defendants could have paid them up in full, and so the defendants are entitled to stand in his position, and it is immaterial what the defendants paid to Alexander & Anderson to acquire their claim. Section 123 gives the right of set-off in so far as it may not be affected by the provisions of the Assignment Act or any other Act respecting fraud or fraudulent preferences. There is nothing whatever in those Acts to prevent the right of set-off. It exists apart, from any statute on the subject. The cases referred to by the other side all depend on the express wording of the English Bankruptcy Act, and therefore have no bearing here: Robson on Bankruptcy, 7th ed., p. 877. The fact that the acknowledgment of the right of set-off might create a preference does not dispose of the case, for a preference is not unlawful except in so far as it is expressly made so: *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265; *Re Central Bank and Yorke*, 15 O. R. 625; *Ex p. Stubbins*, 17 Ch. D. 58; *Gibbons v. Wilson*, 17 A. R. 1.

February 26, 1896. BOYD, C. :—

The right to set-off exists in this case by virtue of section 23 of R. S. O. ch. 124, as well as by the general law relating to set-off. The exception in the last part of sec-

tion 23, "except so far as any claim for set-off shall be affected by the provisions of this or any other Act respecting frauds and fraudulent preferences," is a reproduction of the like words found in the old Insolvent Act of Canada, 1875, sec. 107. These words had their pertinence in that connection by reference to the later section, sec. 135, classed under the heading of "Frauds and Fraudulent Preferences," whereby the acquisition of debts due by the insolvent for the purpose of making a set-off, was prohibited if the transaction was within a certain period before the assignment. Such a provision is not found in the present statute book; and I see nothing in the Act relating to "Assignments by Insolvents," R. S. O. ch. 124, which touches upon the right of set-off in a dealing between debtors to the estate in which the insolvent does not intervene. There is no bankrupt law in force in this Province, and it is dangerous, therefore, to look to English cases as guides upon questions which may infringe the policy of the law as to bankruptcy. Though it is true in the present case, that the dealing between Garland and Alexander & Anderson was after Herbert had absconded, and after his actual insolvency was presumably well known and known to these two, yet, even in England, that will not interfere with the right of Garland to retain the full amount of Alexander & Anderson's debt out of the moneys payable by him to the insolvent.

Judgment.
Boyd, C.

For this purpose, it is enough to cite the words of Bayley, J., in *Dickson v. Cass*, 1 B. & Ad. 342, where he says at p. 354: "*Hawkins v. Whitten*, 10 B. & C. 217, is a decisive authority to shew that they are entitled to deduct that sum from the debt claimed by the plaintiffs. There the defendant claimed to set off notes of the Wellingborough bank, which he had industriously obtained after that bank had stopped payment; and it was held that he had a right to set off the notes, they having been taken before he knew that they had committed an act of bankruptcy."

The line of divergence is at that point. Notice of mere insolvency is not enough to take away the right of set-off

Judgment. as to debts acquired for the purpose of making them the subject of set-off. Notice of an act of bankruptcy does invalidate such an acquisition thereafter. *Hawkins v. Whitten*, proceeds on very much the same lines as *Gibbons v. Wilson*, 17 A. R. 1, viz., that this is a business transaction not prohibited, therefore not illegal.

Boyd, C.

The judgment must be affirmed with costs.

MEREDITH, J. :—

It is admitted that the right of set-off would have existed if no assignment under the Act had been made. The one question raised is, whether the Act respecting Assignments and Preferences by insolvent persons, has taken away that right in the circumstances of this case.

The assignment under that Act was not made until sometime after the defendant had purchased and obtained an assignment to him of the debt in question ; but it is sought to give it a retroactive effect similar to that under bankruptcy laws where such laws are in force.

But the Act provides that "the law of set-off shall apply to all claims made against the estate ; and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plaintiff or defendant, as the case may be." That is, the law of set-off shall apply notwithstanding the insolvency, and notwithstanding the assignment or any of the provisions or purposes of the Act, unless excluded by the later words of the section ; and the more must it apply where the right to set-off is acquired before the debtor brings his estate within the provisions of the Act—something which can be done by him voluntarily or willingly only ; there is no power to compel him to make an assignment ; and the right ought not to depend upon him ; it could hardly have been intended that he could at his will destroy it or permit it to continue, by assigning or not assigning at his choice or whim.

The assignee's contention, therefore, must rest solely Judgment. upon the latter words of section 23, "except in so far as any Meredith, J. claim for set-off shall be affected by the provisions of this or any other Act," etc.

But there is no such Act now in force; we were referred to none, and I am aware of none. One might be more doubtful of that if it had not been more than once pointed out in the judgments of the Court of Appeal, and of this Court, that some of the provisions of the Act were taken word for word from the Insolvent Acts, which from 1869 to 1880, were in force in Canada, without sufficient regard whether they were entirely suited to the various uses to which they were put. This seems to account for the latter words of this section; they were quite pertinent and proper in the Insolvent Act, because of the provisions against such set-off, under certain circumstances, contained in it, but are inapplicable to any existing law, and so yet ineffectual.

In the result, the learned trial Judge's judgment was right, and this motion should be refused. See *Johnston v. Burns*, 23 O. R. 179, 582; *Liquidators of Maritime Bank v. Troop*, 16 S. C. R. 456.

FERGUSON, J., concurred.

G. F. H.

[DIVISIONAL COURT.]

KINNARD V. TEWSLEY.

Bills of Exchange and Promissory Notes—Discount—Signature by Holder under Maker's Name—Right to Recover—Division Court—Postponement of Formal Judgment—Nonsuit—Appeal.

Where a promissory note commencing "I promise to pay," and signed by two makers, was afterwards discounted by the plaintiff for the holder thereof, the money being paid to him on his agreeing to become responsible for the payment of the note, he signing his name under those of the makers :—

Held, per BOYD, C., and FERGUSON, J., that the liability of the person so signing was that of surety, and that the validity of the note was not affected by the manner in which it was signed.

Per MEREDITH, J.—He was liable as maker of a new note.

At the trial in a Division Court two of the defendants did not press their defence, and judgment was given against them, although not formally entered until judgment which was reserved against the other defendant was subsequently given against him. Afterwards, the two defendants moved for a dismissal of the action, which was refused on the ground that judgment having been given against them at the trial they were too late :—

Held, that they could not appeal to the Divisional Court against the judgment.

Statement. THIS was an appeal from the Third Division Court of the county of Haldimand.

The action was to recover \$254 on a promissory note for \$187 and \$67.32 accrued interest.

The note was dated October 24th, 1888, and was made by defendants John Tewsley and Richard Tewsley, payable to bearer, and was by them delivered for value to the defendant Henry W. Dodge. Dodge, desiring to discount the note, went to the plaintiff, who agreed to do so, on, as stated by the plaintiff, the defendant Dodge becoming responsible for the payment of it. As the defendant could not write, the plaintiff wrote his name to the note, putting it under that of the other defendants, to which defendant Dodge attached his mark. The defendant Dodge said that when he asked the plaintiff to cash the note, plaintiff said he would do so if the defendant would endorse it; but on cross-examination, he said that he put his name to the note for the purpose of getting the money

on it, and that, so far as he remembered, neither the words *Statement.*
"maker, guarantor, or endorser," were used.

At the trial, which took place on the 12th of March, 1895, the solicitor who appeared for all the defendants said he did not press the defence as regards the Tewsleys, and the Judge thereupon gave judgment against them, but which was not then formally entered. He reserved judgment as to the defendant Dodge, which he gave on the 25th of the same month, holding him also liable.

The grounds of objection taken at the trial, to the plaintiff's recovery, were: 1. That the note was made, issued and completed prior to the negotiation with the plaintiff. 2. That the defendant Dodge's name was signed in the capacity or character of an endorser, and that no proof was given of presentment or notice of dishonour, which an endorser would be entitled to in order to hold him responsible. 3. That if the defendant Dodge signed in the character of maker, the note would be void, on the ground of this being a material alteration of the note.

On the 2nd of December, 1895, before the Division Court Judge, a notice of motion was given on behalf of the defendant Dodge, to enter a nonsuit or to dismiss the action against him on the grounds raised at the trial; and on the 7th of December, an amended notice for the same purpose was given, which were argued; and on the 14th of January, 1896, judgment was given dismissing the motions with costs. The defendants the Tewsleys had, on the 9th of December, also moved for a nonsuit or dismissal of the action, which, on the 13th of January, the learned Judge dismissed, on the ground that his judgment against them having been given at the trial, the motion was made too late.

From the judgments herein, all the defendants appealed.

On February 18th, 1896, before a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., the appeals were argued.

Argument. *F. E. Hodgins*, supported the appeal of the defendant Dodge. The defendant Dodge signed the note in the character of an endorser. It is immaterial where the note is signed, so long as the intention clearly was to sign in the character of endorser. As an endorser he would be entitled to notice of dishonour, which it is not denied was not given in this case. If, however, he signed as maker, this would be a material alteration of the note and would render it void; even though the effect of the alteration might be to the party's advantage: *Ex p. Yates*, 2 DeG. & J. 191; *Gardner v. Walsh*, 5 E. & B. 83; *Master v. Miller*, Smith's L. C., 9th Amer. ed., 1115; *Reid v. Humphreys*, 6 A. R. 403; *Aldous v. Cornwall*, L. R. 3 Q. B. 573; *Re Commercial Bank of Manitoba*, 10 Man. R. 171.

J. F. Macdonald, for the defendants, the Tewsleys. Before proceeding to argue the legal question, the position of the defendants, the Tewsleys, should be defined. No doubt at the trial the solicitor who appeared for these defendants, did not press the defence as against them. The Judge, however, did not then take advantage of the admission and enter judgment, but allowed the matter to remain open until he was delivering judgment against the other defendant, when he entered judgment against them also. These defendants, therefore, were clearly in time in making the motion to the learned Judge for the nonsuit. The note, when it was signed by the Tewsleys and handed to Dodge, was a completed note, and the result of the evidence is, that when Dodge signed it he signed as a joint maker with the Tewsleys. This was clearly an alteration of the note and rendered it void, at all events as against the Tewsleys.

Swayze, contra. The Tewsleys have no right of appeal. Their solicitor at the trial, as is admitted, abandoned any defence so far as they were concerned, and judgment was then in fact given against them, although not then formally entered, and when they moved they were too late, as the learned Judge has expressly found; and, therefore, they had no right of appeal to this Court.

Then as to the defendant Dodge. The Judge at the trial found that the defendant Dodge was a maker, and his finding is warranted by the evidence. The effect of his becoming a maker cannot relieve him from liability. No case can be found where the defendant can set up his own act to relieve himself from liability: *Master v. Miller*, Smith's L. C., 9th Amer. ed., 1115, at p. 1167; Bills of Exchange Act, 53 Vict. ch. 33, sec. 63 (D.). In any event, he did not occupy the position of an endorser; at the most he was merely a guarantor; the whole intention of the parties was that he was to become responsible for the payment of the note, and no notice of dishonour is in such case necessary. Argument.

Hodgins, in reply, referred to Byles on Bills, 8th Amer. ed., 328-9; *McMurray v. Talbot*, 5 C. P. 157.

February 19, 1896. BOYD, C.:—

The fair result of the evidence is, that the note was signed by Dodge as surety or guarantor on condition of getting the note discounted by the plaintiff, that is, after the making of the note, there was a new transaction for value by which Dodge became liable, not as endorser, but as guarantor of the note. There is no English authority to shew that the addition of a signature by one as surety to a note previously signed by the makers, vitiates the instrument as being a material alteration. The English cases are as to the addition of the signatures of co-makers or co-sureties, and then not uniform. *Clark v. Blackstock*, Holt N. P. 474, implies that the addition of the name of a surety would not at common law vitiate the note, though it might be invalidated by the operation of the Stamp Act.

This case is recognized in *Ex p. White*, 2 Dea. & Chit. 334, 349, as shewing that a new contract after the date of the instrument required an additional stamp—ergo it was a good contract. See also *Ex p. Yates*, 2 DeG. & J. 191.

The English authorities are reviewed in *Mersman v.*

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Judgment. *Werges*, 112 U. S. 139, at p. 142, where it is held that one who signs subsequently as surety, does not affect the liability of the makers. In this view, the position of Dodge is not that of an endorser, and he is liable to pay as between himself and the plaintiff as a new maker—though that is not his status as to the original makers. Judgment, therefore, may well be maintained as to all the defendants on the merits: see *Miller v. Finley*, 26 Mich. 249, and *Gano v. Heath*, 36 Mich. 441.

But the judgment is also right because it is found that the two Tewsleys did not contest the matter, and did not move against the judgment in time; so that they are unable effectively to appeal.

As to Dodge, in any aspect the note is good as to him, and as against him the appeal should fail: see *Dickerman v. Miner*, 43 Iowa 508.

The result is, that the judgment is affirmed with costs.

FERGUSON, J. :—

From the record before us, it seems plain that the defendants, the Tewsleys, were too late with their motion for a new trial. A consequence of this fact is, that these defendants have no right of appeal to this Court. This was, on the argument, conceded, if the conclusion were arrived at that the motion for a new trial was not in good time.

This settles the matter, so far as the defendants, the Tewsleys, have concern.

The defendant Dodge having signed this note as a surety, he getting in cash the amount of the note from the plaintiff at the time upon a bargain or agreement that the plaintiff would give him the money if he would sign the paper, he cannot, I think, be heard to say that he is not liable to the plaintiff. Upon these grounds, I think the judgment appealed from is right, and should be affirmed. I do not dissent from the view of the law stated in *Mersman* *v. Werges*, 112 U. S. R. 139; and in other cases in

the United States Courts, as to the note not being in any respect invalidated by having Dodge's signature placed upon it when and as it was, but placing my opinion upon the other ground, I do not think it necessary that I should further discuss the subject here. Judgment.
Ferguson, J.

I am of the opinion that the judgment should be affirmed with costs.

NOTE.—Since writing the foregoing, the case *Ellesmere Brewing Co. v. Cooper*, [1896] 1 Q. B. 75, has been handed me, but I do not see that it bears on this case.

MEREDITH, J. :—

The learned Judge refused to consider the application of the defendants, Tewsleys, for a new trial because made too late, and admittedly the application was too late if the decision against them were pronounced at the hearing of the case: see sections 144 and 145 of "The Division Courts Act."

It is now contended for these defendants that the decision was not then pronounced, but was pronounced some days later when the decision against the other defendant was given; and, if that be so, this application for a new trial was admittedly in time. But, if this be a matter open to controversy before us upon this appeal, and not proper upon an application for a mandamus to compel the Judge to entertain the application only, there is no evidence in support of the contention, though some of the notes of the trial Judge seem to favour it, and there is the twice repeated statement of the learned Judge, in the certified pleadings in this appeal, against it. And it seems probable that judgment would be given as the learned Judge certifies it was, counsel for these defendants having then stated, in effect, that they had no defence to the action.

We must, therefore, I think, dismiss the appeal of these defendants on this ground, without considering the merits of their appeal.

Judgment. Then, as to the other defendant, assuming that there
Meredith, J. was a material alteration in the note which would vitiate it as to the other defendants, why should he be relieved from liability?

Any material alteration of a note or bill after it has been issued, without the assent of all parties liable on it, avoids it except as against a person who made or assented to the alteration.

Looking upon this defendant as a maker of the note, it is not to be avoided as against him, because he made it. He cannot take advantage of his own wrong. The note is drawn in as appropriate words for one maker as for several—"I promise to pay;" and so this case is different from that of the *Ellesmere Brewing Co. v. Cooper*, [1896] 1 Q. B. 75. This very question has been so decided in the Courts of some of the United States of America, in cases just like this, upon the law merchant applicable alike here as there: see *Mersman v. Werger*; 112 Mass. 139, and there is no Stamp Act in force to prevent the transaction being treated as in law a destruction of the existing note and the making of a new one.

I cannot look upon the defendant as a mere endorser. He did not so sign. He signed as a maker, and the witness signed as if a witness to the signatures of all the makers, including him, alike. It is, of course, open to the parties to shew that, as between them, one was a surety only for the other, and the holder would be affected by notice of the fact; but that does not make the surety any less a maker of the note; if sued upon the writing, he would be sued as maker or endorser only. It seems to me, in the facts of this case, this defendant can occupy but one of two positions, he is a maker or an endorser of the note. As a party to the note, assuming liability for it, he must occupy one or the other position: see *Reid v. Humphrey*, 6 A. R. 403.

I think we must treat this defendant as the maker of a valid note, there being no Stamp Act in force here preventing effect being given to it as a new note.

The learned Judge was, therefore, right in refusing the Judgment. application of this defendant for a new trial, and both Meredith, J. appeals fail and should be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

RE WILLIAMS.

*Executors—Payments by—Promissory Notes—Consideration—Gifts—53
Vict. ch. 33, sec. 30 (D.)—R. S. O. ch. 110, sec. 31.*

Upon appeal from the order of a Surrogate Court upon the passing of executors' accounts:—

Held, that payments made by them to the payees of promissory notes signed by the testator, with notice that such notes were made without consideration and were intended by the testator as gifts to the payees, were not protected either by the *prima facie* presumption of a valuable consideration raised by sec. 30 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), or by the provisions of sec. 31 of R. S. O. ch. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient."

Decision of the Surrogate Court of the county of Elgin reversed upon this point.

AN appeal by the residuary legatees under the will of Samuel Williams, deceased, from an order and decision of the junior Judge of the County Court of the county of Elgin, acting as Judge of the Surrogate Court of that county, upon an audit and passing of the accounts of the executors of the will of the deceased. The promissory notes referred to in the judgment were made by the testator and given to George Williams and John Williams shortly before his death, and it was a question whether there was any consideration for the notes. The testator insisted upon signing them, and as to one of them said he would pay the money if he got better, and if not his executors would; and there was a memorandum at the foot of the other as follows: "If this note is unpaid at my decease, my executors are requested to pay it."

Statement. The learned Judge of the Surrogate Court held that the executors were protected in paying the notes by R. S. O. ch. 110, sec. 31, and that, under the circumstances, the notes were "claims" within the meaning of the statute.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 9th March, 1896.

J. M. Glenn, for the appellants, referred to Williams on Executors, 9th ed., p. 1285; *In re Whitaker*, 42 Ch. D. 119; *In re Richards*, 36 Ch. D. 541; *Rupert v. Johnston*, 40 U. C. R. 11; *Baldwin v. Thomas*, 15 Gr. 119; *In re Rownson*, 29 Ch. D. 358.

J. B. Davidson, for the executors.

J. A. Harvey, for George Williams and John Williams.

March 26, 1896. The judgment of the Court was delivered by

STREET, J. :—

The testator Samuel Williams died about 5th January, 1894, and by his last will appointed D. M. Tait and W. E. Leonard to be his executors.

The questions raised upon the present appeal have arisen upon the passing of the executors' accounts before the Surrogate Court Judge at St. Thomas.

The amount allowed for remuneration to the executors, and certain sums paid by them for interest upon legacies to charities, were disposed of by us upon the argument, the decision of the Judge of the Court below being upheld.

The remaining questions arise from the payment of a note for \$2,000, made by the testator on 4th November, 1893, in favour of one George Williams, payable twelve months after date, and of another for \$500, dated 3rd January, 1894, payable to John Williams, payable three months after date.

These notes were presented to the executors shortly

Judgment.
Street, J.

after maturity; they consulted their solicitor in each case before dealing with the claim, and acting upon his advice they kept back \$100 out of the George Williams note to answer the succession duty in case it should be called for, and took a bond from John Williams for the same purpose with regard to the note payable to him.

I think it must be found upon the evidence that each of these notes was made without consideration, and was intended by the testator as a gift to the payee. With regard to the note to John Williams, I think the evidence of the executors and of the payee shews direct notice to them that it was simply a gift; and with regard to the note to George Williams, that they had sufficient knowledge or information as to its nature to put them distinctly upon inquiry, and that if they did not ascertain the facts, it was because they deliberately abstained from doing so.

The precautions they took upon the advice of their solicitor with regard to the succession duties upon the amounts of the notes are explicable only upon the supposition that they believed the notes to have been given without consideration, but were not aware that the absence of it affected the right of the payees to insist upon payment. How else is their anxiety about the succession duties to be accounted for? They do not suggest that they supposed the duty was payable upon ordinary debts.

I am of opinion, therefore, that the payments should be disallowed, and that they cannot be treated as protected either by the *prima facie* presumption of a valuable consideration raised by the 30th section of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), nor by the provisions of the 31st section of R. S. O. ch. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient," for they had evidence before them rebutting the *prima facie* presumption arising from the signature of the testator, and they had no other evidence to sustain the claim: *In re Rowson*, 29 Ch. D. 358.

I think, however, that the executors should have the

Judgment.
Street, J.

option of raising the question directly in an issue between themselves and the two payees, John and George Williams, because the payees are not bound by our decision, and it might happen that the executors, after refunding the money to the estate, might, upon some new state of facts, or by the judgment of another tribunal, find themselves refused relief against the payees.

The order upon this appeal should, therefore, not be taken out until the executors determine whether they will take the course suggested or not, and for this purpose it will be stayed for a month, and thereafter until further ordered.

I have not referred to the form of the notes, because I thought it unnecessary to do so, but I think there was upon the face of both of them, and especially upon that to John Williams, enough to put a reasonable man upon inquiry.

E. B. B.

KERR V. SMITH ET AL.

Will—Legacy—"Legal Personal Representatives"—Vested Share.

Devise of land to executors and trustees upon trust to allow the testator's wife to use and occupy it during her life and after her death to sell and pay, among other legacies, a moiety of the purchase money to his son, with a provision that if any of the legatees died before their shares should be paid over, the share of the person so dying should be paid to his "legal personal representative."

The son assigned his share to the plaintiff, and died before his mother and before payment:—

Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executor and administrator as "legal personal representative," and that the plaintiff was entitled.

THIS was an action brought by John W. Kerr, against Statement. the executors of the will of Amos Moore and the children and next of kin of John Moore, under the following circumstances:

Amos Moore by his will devised certain land to his executors and trustees upon trust, to allow his wife Louisana Moore, to use, possess and enjoy the same during her life, and after her death, to sell it and dispose of the purchase money amongst other ways as follows: one moiety or half of it to be paid to his son John Moore; and he made other devises of realty as well as pecuniary legacies out of the bequests of personal estate, and at the end of his will he inserted the following clause:—

"I will and direct that in the event of decease of any of the said legatees or devisees before their shares shall be paid over to them, that then and in such case the share or portion of the devisee or legatee so dying, shall be paid to their legal personal representatives."

Amos Moore died in 1873, without revoking or altering his will. Louisana Moore used, possessed and enjoyed the land during her life, and died in the year 1894. John Moore on September 29th, 1875, assigned and conveyed all his interest in the lands which were subject to the widow's life estate to the plaintiff, and died on September 22nd, 1893.

Statement.

The executors and trustees of the will of Amos Moore, declined to recognize the plaintiff's claim as against a claim made by John Moore's children, except under the direction of the Court, and this action was brought to declare the plaintiff's rights, and was heard on motion for judgment on March 19th, 1896, before Boyd, C.

James Bicknell, for the plaintiff. The words "legal personal representatives," mean executors and administrators, and are words of limitation, and so carry the whole estate: *Price v. Strange*, 6 Madd. 159; *Webb v. Sadler*, L. R. 8 Ch., at p. 429; *In re Ware, Cumberlege v. Cumberlege-Ware*, 45 Ch. D. 269.

H. W. Mickle, for the next of kin. The whole will must be looked at. There are two classes of legacies—those payable immediately after the death out of personal estate, and those payable out of proceeds of real estate to be sold after the widow's death. The clause at the end of the will applies to both and must be construed to preserve the rights of the legatees in each class. So that clause makes a gift over, and the words "legal personal representatives," mean next of kin: *Bridge v. Abbot*, 3 Bro. C. C. 224; *Cotton v. Cotton*, 2 Beav. 67; *Re Thompson, Machell v. Newman*, 55 L. T. N. S. 85, should be followed in preference to such cases as *Corbyn v. French*, 4 Ves. 418: see *In re Crawford's Trusts*, 2 Drewry, at p. 242. Although the testator uses the word "executors" eleven times in his will, he here uses the words "legal personal representatives": *Walter v. Makin*, 6 Sim. 148 (in which case the fund had been assigned); *Walker v. The Marquis of Camden*, 16 Sim. 329, and *Burkitt v. Tozer*, 17 O. R. 587. Testamentary power was given in the will to the widow, but not to other legatees, shewing an intention to discriminate. He also uses the plural "representatives," shewing that one executor or administrator would not suffice. The lands being still unsold, are still vested in the executors, and John Moore merely took a contingent interest: *Elwin v.*

Elwin, 8 Ves. 546, approved in *Johnson v. Crook*, 12 Ch. D., at p. 645, and *In re Chaston*, *Chaston v. Seago*, 18 Ch. D., at p. 228. The words "paid over," shew that there was to be no vesting. As to the gift over, I refer to Theobald on Wills, 4th ed., pp. 563, 567.

W. L. Payne, for the executors, submitted to the direction of the Court.

Bicknell, in reply. The cases cited do not decide that the land did not vest, but that the divesting clauses were operative. I refer to *In re Clay*, *Clay v. Clay*, 54 L. J. Ch. 20, 32 W. N. 516; *Wing v. Wing*, 34 L. T. N. S. 941.

March 20th, 1896. BOYD, C. :—

In *Alger v. Parrott*, L. R. 3 Eq. 328, the direction was to pay to A. for life, and after A.'s death, to be paid to A.'s personal representatives; and Wood, V.-C., said, that though it was a round about way of expressing an absolute gift, the words had a distinct meaning, and must bear that primary import; and the primary meaning of personal representatives was "executors and administrators."

The authorities are elaborately reviewed and discussed by Malins, V.-C., in *Stockdale v. Nicholson*, L. R. 4 Eq. 359, and the primary meaning of these words affirmed, unless they were modified by some controlling context.

As to the peculiar allocation of words found in this will, the Vice-Chancellor, Knight Bruce, said, in 1846, "I do not think there is any case in which the words legal personal representatives, have been held to be next of kin": *Arbuthnot v. Norton*, 5 Moo. P. C., at p. 224.

A different meaning was given to these three words by Kay, J., in *Re Thompson*, *Machell v. Newman*, 55 L. T. N. S. at p. 87 (1886), but it was in consequence of their being used by the testator as meaning next of kin by reference to other parts of the will.

I do not find upon the face of the will any indication that the words in question should have other than their primary and usual meaning. That being so, the property

Judgment. has in effect vested in the son John Moore, by being given in the event of his death, "as his share" to his executor or administrator, as "legal personal representative."

Boyd, C.

Doubt has been cast on the authorities which are at the foundation of a different interpretation, such as *Bridge v. Abbot*, 3 Bro. C. C. 224, and *Cotton v. Cotton*, 2 Beav. 67: see Hawkins on Wills, p. 108. But both these cases turned upon the fact that the legatee had predeceased the testator.

The plaintiff has, therefore, the *locus standi* which he claims as assignee of the legatee, John Moore.

G. A. B.

[DIVISIONAL COURT.]

BROWN V. CARPENTER.

Appeal—Divisional Court—Discovery of New Evidence—Motion for New Trial—County Court Judgment—Law Courts Act, 1895, sec. 44, sub-sec. 3.

A Divisional Court has no jurisdiction under section 44, sub-section 3 of the Law Courts Act, 1895, to hear an appeal from a County Court in term refusing a new trial on the ground of the discovery of fresh evidence, and this applies to a judgment given before the Act came into force.

Statement. THIS was an appeal from the judgment of the County Court of Ontario in an action on a promissory note for \$250.45, in which, after allowing certain payments, judgment was entered for the plaintiff for \$213.75 with costs.

A motion was made by the defendant to the County Court in term to set aside this judgment, and for a new trial, on the ground of the discovery of new evidence. Judgment was given on this motion on December 26th, 1895, dismissing it with costs; and from this judgment the defendant appealed.

On February 18, 1896, before a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ.,

McGillivray, for the defendant, proceeded to support the appeal, when a preliminary objection was taken by *Shepley*, Q. C., and *J. E. Farewell*, Q. C., for the defendant, that the appeal would not lie.

McGillivray, contra.

February 20th, 1896. BOYD, C. :—

Under the Law Courts Act, 1895, ch. 13, sec. 44, sub-sec. 3, a motion for new trial "on the ground of discovery of new evidence," must be made before the County Court, and no provision appears giving any right of appeal in such a case. The ruling of the Judge would seem therefore to be final and absolute. The order made on 26th December, 1895, refusing a new trial, would have been appealable under the R. S. O. ch. 47, sec. 41, sub-secs. 3 and 4; but this provision ceased to be law on the 1st of January, 1896, when the Law Courts Act was proclaimed.

Rule 1509, relates to pending business, and applies first to cases where an appeal lies under the Law Courts Act, and provides that where the appeal has not been set down, it is to be prosecuted under the new procedure; and where such appeal has been set down to be heard, it shall be transferred to the proper Court under the new procedure; and secondly, that rule applies to cases where an appeal lies under the former law, but no appeal lies under the Law Courts Act; and in these cases where an appeal has been commenced, it shall be prosecuted under the old procedure.

This appeal falls under the latter branch of the rule; a matter of appeal which obtained under the former, but not under the present practice; and it cannot be prosecuted in this Divisional Court of appeal for want of jurisdiction.

There is no appeal given under section 42 for a motion of this kind, because by the Law Courts Act, 1895, the motion is to the "County Court," whereas section 42 applies to cases in which "the Judge" acts, and not the

Judgment. Court. If there is a *casus omissus* in the new procedure, it is more fitting that the Legislature should rectify it than that the Courts should go beyond the fair meaning of the sections.
Boyd, C.

We heard the matter on the merits. I am not satisfied with the decision below, but we cannot interfere. I would simply strike out the appeal without costs.

FERGUSON, J. :—

The decision appealed from was upon a motion made in the County Court for a new trial, on the ground of the discovery of fresh evidence.

Sub-section 3 of section 44 of the Law Courts Act, 1895, provides that such a motion shall be made before the County Court. This section 44 is substituted for section 41 of the County Courts Act, and there is no provision made by it for an appeal from a decision on a motion of this character, although appeals from decisions of other kinds, seem to be provided for with some particularity.

I do not see that section 42 of the County Courts Act, as amended, provides for an appeal in a case of this kind. I do not find any provision authorizing this appeal.

Assuming then that an appeal does not lie under the provisions of the Law Courts Act of 1895, and the new rules, it may possibly be that the appeal, if it had been commenced, can be proceeded with, as if the Act and rules had not been passed: see Rule 1509, sub-sec. 2. As to this last, I say nothing more. It is a matter for the appellant to consider.

The appeal, as I think, should be struck out, and I agree as to the costs.

MEREDITH, J. :—

The "substituted" section 41 requires that the motion for a new trial, on the ground of discovery of new evidence or the like, be made "before the County Court;" but

makes no provision for any appeal from the judgment of ^{Judgment.} that Court pronounced upon the motion; thereby making ^{Meredith, J.} that judgment final in all cases coming under the provisions of the Law Courts Act, 1895, which came into force on the first day of January, 1896, for section 42 of the Division Courts' Act is inapplicable to such a judgment of the Court; and, having regard to the original section 41, obviously inapplicable to a judgment upon a motion for a new trial, such as that now in question; and there is no other provision in either Act for such an appeal as this.

The new rules cannot give any right of appeal, nor take away any such right if existing, for the power conferred upon the commissioners who framed them, was, under section 42 of the Law Courts Act, 1895, only "to devise and frame such general rules as may be necessary for carrying out and giving effect to the provisions of this Act."

Nor do the rules purport to do so. The first part of Rule 1509, applies to cases where an appeal lies under the Act, or those rules only; and there is nothing in the rules purporting to give any right of such appeal; and, the second part, to cases where an appeal lay, "and had been commenced," before the Act and rules came into force.

This Court has, therefore, no jurisdiction to entertain this appeal; and that result seems to be in accord with the purposes of the Legislature, shewn in this section and in other provisions of the Act, to curtail, to a considerable extent, then existing rights of appeal: see especially section 2, entitled "One Appeal Only."

G. F. H.

[CHANCERY DIVISION.]

HENRY V. DICKIE ET AL.

Mortgage—Larceny—Consideration—Mitigation of Sentence—Validity.

The defendant while a prisoner arrested on a charge of larceny sent for the agent of the owner of the property stolen and, admitting his guilt, offered to give security by mortgage for the value of the goods stolen. The agent informed him he would have to take his trial whether he gave a mortgage or not, and that he could not release him from his position even if he secured him, but after the security was given he let him know that he would endeavour to get a mitigation of the sentence, which he afterwards did :—

Held, that there was no sufficient evidence that there was any agreement to stifle the prosecution and that the security was valid; STREET, J., dissenting, being of opinion that the evidence shewed that an agreement or understanding to give the security was come to before it was given.

Statement.

THIS was an appeal by Alice Dickie, wife of the defendant Thomas Dickie, who had become the owner of the equity of redemption in certain lands, subject to two mortgages previously made by him, from a report of the Master at Whitby, who had allowed a claim made by one Thomas H. McMillan under the second mortgage, which had been given under the circumstances set out below.

The defendant Thomas Dickie had been arrested for stealing clover seed, and while under arrest had sent for the agent of the person whose seed had been stolen and admitting his guilt offered to give security by a mortgage on his property.

The evidence which is more particularly set out in the judgments shewed that the agent, while he declined to make any bargain on the subject told the prisoner he would have to take his trial just the same whether he gave a mortgage or not; and that he could not release him from his position even if he secured him; but he let him know that on making a settlement he would endeavour to get a mitigation of the sentence, which he afterwards did by speaking to the magistrate on the morning of the trial, which took place the day after the mortgage was signed, and telling him that the prisoner had made all the restitution he could and by asking him to be lenient.

The appeal was argued on January 9th, 1896, before a **Argument.**
Divisional Court composed of BOYD, C., and STREET, and
MEREDITH, JJ.

Hamilton Cassels, for the appeal. The mortgage is invalid. The consideration was illegal, a promise made while the prisoner was in custody. The evidence shews the inducement held out, viz., influence with the magistrate, really a compounding of a felony. The prisoner was influenced to give the security. I refer to *Toponce v. Martin*, 38 U. C. R. 411; *Watts v. Mitchell*, 26 Gr. 570; *Lound v. Grimwade*, 39 Ch. D. 605; *The Corporation of the City of St. Thomas v. Yearsley*, 22 A. R. 340; *The Peoples Bank of Halifax v. Johnston*, 20 S. C. R. 541; *Buck v. The First National Bank of Paw Paw*, 27 Mich. 293; *Jones v. Merionethshire Permanent Building Society*, 65 Law Times R. 687; [1892] 1 Ch. 173.

J. F. Grierson, contra. The prisoner was the moving party; he acknowledged his guilt and volunteered the security: *Kneeshaw v. Collier*, 30 C. P. 265; *Flower v. Sadler*, 10 Q. B. D. 572.

Cassels, in reply, referred to *Bell v. Riddell*, 10 A. R. 544.

February 26, 1896. BOYD, C.:—

The evidence, which is not contradicted, shews that Dickie who had stolen wheat and was under arrest for it, offered to give a mortgage for the value of what he had stolen without any inducement being offered to him by the prosecutor or any one else. Babcock, his brother-in-law, took the mortgage to the lock-up for execution by Dickie.

To Babcock, Guy, the prosecutor and agent of the owner of the wheat, said that he would do all he could to make it easy for Dickie. It does not appear that this was made known to Dickie. But it does appear in Guy's affidavit that he told Dickie when he offered the mortgage, that he

Judgment.**Boyd, C.**

could make no settlement with him so far as having him released, and that he would have to take his trial just the same whether he gave a mortgage or not.

Next morning before the prisoner was brought before the police magistrate, Guy told the magistrate that he, Dickie, had made all the restitution he could, and asked him to be lenient. Dickie, when brought before the magistrate, pleaded guilty, and was let out on suspended sentence.

Dickie may have expected that by giving the mortgage he might get an easier sentence, but there was no promise of the kind, and no agreement that there should be any interference with the course of justice.

After the mortgage was given, and on the morning of the next day, Guy said to Dickie that he could not interfere with the law, but that he would do his best to make it light.

Guy at one part of his examination says: "I let him know that on making a settlement I would endeavour to get mitigation of the sentence, and I carried this out in good faith by telling the magistrate the facts." The other parts of the examination shew, I think, that this was *after* making the settlement by giving the mortgage. No promises seem to have preceded the giving of the security, even if that would be material in estimating the legality of what was done.

There was no promise to stifle or suspend the prosecution, and no step taken by the prosecutor which interfered with the due prosecution of the offender down to conviction. After that the fact of restitution was used to operate upon the mind of the magistrate to deal leniently with the prisoner; but I do not find that this is in violation of the humane tendencies of English law which regard even the well being of criminals, while not overlooking the paramount claims of the public to be protected from crime.

Besides the cases cited by the Master in his careful judgment, and in argument, I note valuable decisions in *Windhill Local Board of Health v. Vint*, 45 Ch. D. at p.

363; *Ward v. Lloyd*, 6 M. & G. 785; *Flower v. Sadler*, 10 Q. B. D. 572.

Judgment.
Boyd, C.

I would affirm the Master's judgment, with costs to be added to mortgage claim.

MEREDITH, J.:—

It does not appear from the evidence that there was any promise or understanding between the mortgagor, or any one for him, and Mr. Guy, in regard to the criminal proceedings. If there were, the mortgagor and Mr. Babcock might have proved it; but no attempt was made to do so by affidavit or otherwise. The Master's findings that there was no promise made, and no inducement held out to the mortgagor in regard to the crime, seem warranted by the whole evidence, though some isolated passage extracted from the testimony may, disregarding all the rest, look otherwise. The circumstances of the case are quite different from those of the case of *Williams v. Bayley*, L. R. 1 H. L. 200.

Then we have the case of a person who has stolen goods, and is under arrest charged with the crime, giving, for the benefit of the owner, a mortgage to secure payment of their actual value, and giving it of his own motion, quite voluntarily. How can such a transaction be said to be, in any sense, a stifling of a prosecution, or in any sense, against public policy? Of course every such transaction must be scrutinized very closely, but where there is no doubt of the facts, why should it not stand? The owner might have retaken his own property, subject of course to any right of the Crown for the purpose of prosecuting for the theft: he might at once have sued to recover it or its value, and have had execution, under which the mortgaged property would have been available to make good his loss. I can perceive no good reason why he might not lawfully take this security. And the provision made afterwards, that the owner would do what he could to have punishment mitigated, however it might affect the question, whether or not there

Judgment. was an understanding before to the same effect, could not change the legal transaction into an illegal one.
Meredith, J.

Lord Eldon is reported, in the case of *Norman v. Cole*, 3 Esp. 253, to have decided in effect, that an action would not lie to recover money for procuring a pardon; and to have used these words: "I cannot suffer this cause to proceed. I am of opinion, this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act, of that description, should proceed from pure motives, not from pecuniary ones. The money is not recoverable." And the case of *Buck v. The First National Bank of Paw Paw*, 27 Mich. 293, is to the same effect. See also *Bremsen v. Engler*, 49 N. Y. Sup. Ct. 172; and *Timothy v. Wright*, 8 Gray (Mass.) 522.

But such cases are quite different from this, for in them there was no consideration but the services to be performed, and the influence to be used to procure pardon or mitigation of punishment: here, the debt, the civil liability, was the sole consideration—that lawful consideration was not even tainted with what those cases indicate would not be valid consideration. The promise was not made until after the security had been voluntarily given. And the law against holding out inducements to restore stolen property has not been invaded.

The learned Master was quite right, and this appeal should be dismissed.

STREET, J. :—

I regret that I am unable to concur in the view taken by the other members of the Court of the facts of this case.

Mr. Guy, in his cross-examination upon his affidavit says: "I told Dickie in the lock-up before the mortgage was given, that he would have to take his trial just the same whether he gave a mortgage or not. * * I told him I could not release him from his position even if

he secured me. I presumed he wanted to escape punishment as far as he could. He might have thought or inferred that I could have him released. I let him know that *on making a settlement* I would endeavour to get a mitigation of the sentence, and I carried this out in good faith by telling the magistrate the facts.”

Judgment.
Street, J.

In the face of this statement I do not see how the finding of the Master that “no promise, solicitation or inducement was made by McMillan on behalf of the bank or by Guy & Co., or by any one acting for either of them to execute such mortgage,” can be upheld.

On the contrary, my conclusion from the evidence is that Guy obtained the mortgage by promising Dickie that if he would give it, he would endeavour to have his punishment made as light as possible.

And I think it is clear that such a bargain is founded on an illegal consideration, and that a security given in consequence of it cannot be enforced.

Lord Justice Bowen, speaking of a similar transaction in *Jones v. Merionethshire Permanent Building Society*, [1892] 1 Ch. 173, says, at p. 185: “It is a circumstance which may lawfully be taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured, to himself and others? He must make no bargain about that. If reparation takes the form of a bargain, then, to my mind, the bargain is one which the Court will not enforce.”

To the same effect is the judgment of Lord Westbury in *Williams v. Bayley*, L. R. 1 H. L. 200, at p. 220; *Windhill Local Board of Health v. Vint*, 45 Ch. D. 351; *The Corporation of the Town of Hungerford v. Latimer*, 13 A. R. 315.

In *Flower v. Sadler*, 10 Q. B. D. 572, to which we were referred there was a threat of criminal proceedings resulting in the giving of the security and the abandonment of the threatened prosecution, but no bargain was shewn, and

Judgment. the Court following *Ward v. Lloyd*, 6 M. & G. 785, enforced
Street, J. the security because there was no actual bargain.

In all the cases to which I have referred above, the abandonment or stifling of actual or threatened proceedings was the illegality relied upon, and it is argued that here the bargain expressly provided that the proceedings should proceed, and Dickie in fact did plead guilty when brought for trial before the magistrate the day after the security was given; and that therefore there was no stifling of a prosecution, or attempt to do so.

It is laid down, however, that "any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal": *per* Lord Lyndhurst in *Egerton v. Earl Brownlow*, 4 H. L. C. 1, at p. 163, followed in *Lound v. Grimwade*, 39 Ch. D. 605. And Lord Westbury says in *Williams v. Bayley*, above referred to, at p. 220: "If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself."

In my opinion, therefore, we should allow this appeal, and refuse to enforce the mortgage; because it was obtained by an illegal consideration, and because the circumstances under which it was obtained shew the exercise of undue influence on the part of the persons for whose benefit it was taken.

G. A. B.

[CHANCERY DIVISION.]

YOUNG V. WARD ET AL.

Husband and Wife—Desertion of Wife—Separate Property—Board and Lodging—“Employment or Occupation”—R. S. O. ch. 132, sec. 5.

A married woman, deserted by her husband is entitled, as her separate estate, without any order for protection, to moneys earned by her by letting lodgings in a house furnished by her husband and by supplying board and other necessities to the lodger, and can recover the same in an action in her own name as moneys acquired by her in an employment and occupation in which her husband has no proprietary interest under the 5th section of the Married Woman's Property Act, R. S. O. ch. 132.

BOYD, C., dissenting as regards the claim for board and lodging.

THIS was an appeal from a judgment of ROBERTSON, J., Statement.
in an action brought by Catherine Young against one William Ward and his sons to set aside a lease and conveyance made by him to them of his farm and a mortgage thereof.

Marion Ward, the wife of the defendant, had recovered a judgment for alimony against her husband, arrears of which were unpaid.

Subsequent to the recovery of the judgment for alimony the conveyances in question were made.

Marion Ward took proceedings to attach the moneys due under the mortgage, and obtained an order for the payment of the interest to her, and of the principal into Court, at the maturity of the mortgage, to meet her claim.

The interest not being sufficient to satisfy the allowance for alimony, she brought an action to set aside the deed and mortgage, but her action was dismissed on the ground that she had approved of the transaction by attaching the mortgage moneys.

This action was then brought by the plaintiff, a married woman living apart from her husband, to set aside the conveyance, and was founded on a claim against William Ward for \$58 for board, lodging, medicine and attendance supplied to his wife, Marion Ward, while living separate from him, her alimony allowance being unpaid, for which

Statement. claim judgment against William Ward, amounting with costs to about \$75, was recovered in a Division Court pending this action, which was tried at Bracebridge on June 9th and 10th, 1895, before ROBERTSON, J., without a jury.

J. McGregor and *B. E. Swayzie*, for the plaintiff.

James E. Jones, for the defendants.

November 12th, 1895 :—

The learned Judge dismissed the action, holding that it was really the action of Marion Ward, the plaintiff being put forward by her to do what the Court had already held Marion Ward could not do, and was a paltry action not strongly calling for the interference of the Court; that the transaction was a reasonable one for the father (a farmer) and his sons to enter into and he held that there was no such fraudulent intent on the part of William Ward and his sons as warranted him in finding in favour of the plaintiff.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on January 8th, 1896, before BOYD, C., and STREET, and MEREDITH, JJ.

J. McGregor and *B. E. Swayzie*, for the appeal, contended it was not necessary to shew fraud; that the plaintiff was hindered and delayed, and referred to *Freeman v. Pope*, Brett's L. C. Bl. ed. 334; *Murtha v. McKenna*, 14 Gr. 59.

DuVernet, and *J. E. Jones*, contra, referred to *In re Johnson*, *Golden v. Gillam*, 20 Ch. D. 389; *Ex. p. Mercer*, *In re Wise*, 17 Q. B. D. 290; *Cameron v. Cusack*, 17 A. R. 489; *May on Fraudulent Conveyances*, Bl. ed. 36, 276; *Clarkson v. Sterling*, 14 O. R. 460; *Crombie v. Young*, 26 O. R. 194; *Wood v. Reesor*, 22 A. R. 57; *Daniells' Chancery Practice*, 6 ed. 1955.

McGregor, in reply, referred to *Wait on Fraudulent Conveyances*, 2nd ed. 148, 315.

February 26th, 1896. BOYD, C. :—

Judgment.

Boyd, C.

The status of the plaintiff, a married woman, to attack as a creditor of the defendant, William Ward, the disposition which he made of his land is questioned, and it is open to question by the other defendants, though she has recovered (pending this action) a judgment for the amount in the Division Court against William Ward.

William Ward, it is said, so treated his wife, Marion Ward, that she was obliged to leave his house and she was for some months kept as a lodger by the plaintiff, whose husband was at the time absent in Manitoba.

It is for so many weeks' pay for this period that the plaintiff has recovered against the defendant William Ward, as for necessaries furnished to his wife: but the plaintiff's right as a creditor rests upon the underlying question as to whether this claim does not, in law, belong to her husband, who is not before the Court.

It is said that, pending action, a judgment has been recovered in the Division Court for \$58 for board, lodging, etc., from 3rd of April, 1894, to September, 1894.

The charge for lodging was at the rate of \$2 a week, which would, therefore, form the bulk of the claim recovered and would leave a residue too small whereon to found a writ of execution against lands: 57 Vict. ch. 23, sec. 8 (O.).

It is evident that the trial Judge placed more reliance upon what the plaintiff said at the first part of her testimony than her closing words, which sought to change the situation as between her and her husband.

At first she speaks of her husband as being absent from home in search of work. He had been away about six months when the lodger first came to the house—that there was no separation or desertion—but that she was living with the family in the common home—one room of which they made a practice of renting, but only this one lodger was there during the husband's absence.

It is proved that all the furniture in the house belongs

Judgment. to the husband and it does not appear in whose name the lease is—if there is any.
Boyd, C.

The members of the family appear to pay the rent and no protection order was obtained by the wife to entitle her to the earnings of the family under section 21 of the Act.

Upon this general and rather vague evidence I think that the husband would be legally liable for the provisions supplied for the wife and family and also for the rent of the house—which it is to be presumed is suitable for their station in life: *Ruddock v. Marsh*, 1 H. & N. 601.

Certainly the husband's furniture would be liable to distress in case the rent was not paid, the mere fact of the husband being absent in Manitoba while the wife continued in Toronto does not enlarge her rights in regard to any income derived from renting a room in the house occupied by the family.

As said by Sir C. Robinson in *King v. Sansom*, 3 Add., at p. 280: "Married persons separating by mere voluntary agreement, without any legal sanction, are still, in the eye of the law, in a state of *matrimonial co-habitation*, how *locally* situate soever; and upon what terms soever of *matrimonial intercourse*": see *Marshall v. Rutton*, 8 T. R. 545.

The husband would be still answerable for necessaries and the rent coming from a lodger or one occupying a room in the house would still be his property—to be collected at his suit and not at that of the wife.

This line of defence is open to the defendants in order to shew that the plaintiff is not a creditor entitled to question the dealings of the defendants with the land in question, and the fact of her having recovered judgment for the amount in the Division Court is *res inter alios acta* and does not confer on her the status of a creditor as against the defendant, William Ward: *Allan v. McTavish*, 28 Gr. 539 and 8 A. R. 440.

The Married Woman's Act, in the clause as to the earnings of wives, does not seem to contemplate such a transaction as this. R. S. O. ch. 132, sec. 5, covers two classes

of cases: *first*, where the money or wages is gained by her for services in a business in which she is engaged (*i.e.*, as a subordinate); or *second*, in a business which she herself carries on (*i.e.*, as principal) wherein her husband has no proprietary interest.

Judgment.

Boyd, C.

The act of taking in one lodger into the family home can hardly be classed under the heading of "employment, trade or occupation." These being the words of the statute: see *Ashworth v. Outram*, 5 Ch. D., at p. 939, as to the meaning of the words "employment, trade or occupation"; and *Cooney v. Sheppard*, 16 C. L. T. Occ. N. 4, as to the words "proprietary interest"; and *Lewis v. Graham*, 20 Q. B. D. 780, and *Graham v. Lewis*, 22 Q. B. D. 1, as to the words "carry on business."

It is not needful to go further to uphold the judgment, but I may add that I do not think a sufficient case of inability to pay has been proved as against the defendants to justify the application of the statute of Elizabeth.

It is said that the chattels were of value say \$3,000, and are subject to a claim of \$1,000, which would leave a good margin and more than enough to satisfy the small claim of the plaintiff.

Application is made to amend by adding the husband as a party plaintiff.

The case cited of *Abouloff v. Oppenheimer*, 30 W. R. 429, has no application, for there the cause of action was originally joint and the wife assumed to sue alone and the absence of the husband was merely matter in abatement if pleaded.

But here part of the cause of action rests in the husband and part, as to personal services, in the wife—we have no means of discriminating how much, but the separation would probably bring both under \$40, and so not give either a status to attack the disposition of the creditor's lands.

But otherwise the case does not appear to be such as to justify the extraordinary indulgence in an Appellate Court and at the twelfth hour when judgment is to be given.

Judgment.

Boyd, C.

The husband is not precluded from suing in his own right if he chooses to do so. The amendment sought is not in order to determine the rights of the parties but to introduce new rights in order to validate an imperfect and unsuccessful claim by the present plaintiff.

MEREDITH, J. :—

The plaintiff's claim is based upon a simple contract, not upon any judgment; and there is no evidence of any judgment; indeed, it does appear from the evidence that the action in the Division Court had not been tried, at the time of the trial of this action, and the pleadings contained no reference to it, I, therefore, treat the case as it thus appears, though it is said, in the judgment in appeal, that after the trial of this action the plaintiff did recover judgment upon her claim in the Division Court.

Then can the plaintiff recover upon her claim as made in this action? It is said that she cannot; that the right is her husband's not hers: that is the only objection to it urged before us.

The evidence shews that the husband, two or three years before the trial, went to Manitoba and has since resided there, and since then has had no intercourse or correspondence with the wife, and apparently, and as she thinks, has no intention of ever returning, but has really deserted her.

She and her sons have remained in Toronto, and live together in a house rented by them, and have supported themselves out of their own earnings.

All that remains to shew any property in the husband is some furniture which was bought with his money many years ago.

One room in the house is let by the plaintiff to lodgers: it was so let to the wife of the defendant, William Ward, and board, and also washing and some medicine, were supplied to her by the plaintiff under such circumstances as rendered that defendant liable for them, and under an ex-

press agreement made by her for payment, by him to the plaintiff of them.

Judgment.
Meredith, J.

In these circumstances, and the plaintiff's husband in no way interfering or pretending to have any right in the matter, or any concern in his wife's business or occupation, I am of opinion that the one objection to the claim ought not to prevail. Indeed, before the passing of the statutes, enlarging so greatly a married woman's rights in this respect, it seems to me that the plaintiff might perhaps have succeeded upon the equity referred to in such cases as *Carroll v. Fitzgerald*, 6 A. R. 93, and *Ashworth v. Outram*, 5 Ch. D. 923, the question involved in no way affecting the husband's creditors.

In the former case Patterson, J.A., in delivering the judgment of the Court of Appeal, after saying that the law upon the subject is very plain and that he cannot state it more clearly than by quoting from Roper on Husband and Wife, gives, with other quotations, the following: "If therefore the husband *merely agree*, in articles before the marriage, that his wife shall carry on business on her own sole account; or, without any such agreement, if he *permit* her to do so afterwards, all that she earns in the trade will in equity be her separate property, and be applicable and disposable by her as such, subject to the demands affecting it. So also it will be, if the husband desert her, and she by the aid of her friends carry on a separate trade for her support," p. 96. But, however that may be under her enlarged rights under "The Married Woman's Property Act," I cannot doubt that the objection fails.

The fifth section of the Act is in these words:—"5—(1.) Every married woman, whether married before or after the passing of this Act, shall be entitled to have and hold as her separate property, and to dispose of as her separate property, the wages, earnings, money and property, gained or acquired by her in any employment, trade or occupation in which she is engaged or carries on, and in which her husband has no proprietary interest, or gained or acquired by the exercise of any literary, artistic or scientific skill."

Judgment. The section is now very wide, amendments have been made no doubt to meet difficulties suggested by such cases as *Murray v. McCallum*, 8 A. R. 277 : see *Cooney v. Sheppard*, 16 C. L. T. Occ. N. 4.

Surely the money in question was money acquired by her in some employment and occupation and in which her husband had no proprietary interest. It was none the less an occupation because her resources were limited to one lodger and boarder only at a time, nor less employment in furnishing that one board and attending upon her and doing her washing : *Lumley v. Timms*, 28 L. T. N. S. 608 ; *Mary B. Chapman v. Alanson Briggs*, 11 Allan (Mass.) 546 ; *Louisa S. Dawes v. Louis Rodier*, 125 Mass. 421.

It is erroneous to say that the husband was or could have been made liable for the expenses of the household ; the wife doubtless had power to pledge his credit for necessities for herself, he having deserted her and provided no means for her support ; but that is something very different from paying the rent and household expenses of the wife and grown up children, and the boarder and lodger : see *Bazeley v. Forder*, L. R. 3 Q. B. 559 ; and besides this his credit was not pledged for anything.

I cannot imagine any proprietary interest he could have in the business.

I must say that there seems to me no doubt of the plaintiff's right of action for the board, lodging, washing and medicine. Then can there be any doubt upon the other branch of the case ? * * * * *

STREET, J., concurred with MEREDITH, J.

G. A. B.

NOTE.—On the other branch of the case, the conveyances were set aside as fraudulent and void against creditors, and the judgment of ROBERTSON, J., was reversed.

[COMMON PLEAS DIVISION.]

ABRAHAM V. HACKING.

Husband and Wife—Contract—Separate Estate—Personal Articles.

Where, at the time of a contract being entered into by a married woman, the only property possessed by her consisted of her engagement and wedding rings, a silver watch and chain and her clothing :—
Held, that this was not separate estate with respect to which she could be reasonably deemed to have contracted.

THIS was an action tried before ROBERTSON, J., at the Statement.
non-jury sittings at Stratford, on November 19th, 1895.

This action was against the defendant Annie Hacking, a married woman, as endorser of three promissory notes for \$146.66 each, dated 28th November, 1894.

The question was as to whether the defendant was possessed of separate estate at the time of her endorsement, with reference to which she could be deemed to have contracted.

The evidence shewed that at the time of the endorsement, the only property she possessed was a gold ring given to her by her husband previous to marriage as an engagement ring, her wedding ring, a silver watch and chain, and wearing apparel, including a sealskin coat which she had worn for some years ; that though at the time of her marriage she had been possessed of a number of articles, which she had received on her marriage as wedding presents, these in 1889, had been seized and sold under an execution issued in an action against her husband, and were purchased by her father at the sheriff's sale, she having acquiesced and assented to the sale, and that these goods were subsequently treated as her father's, and that, on her father's death intestate, after the making of the notes sued on, she accepted them as part of her share of her father's estate.

It was also proved that at the time the notes were sent to the defendant for her endorsement a form of statutory declaration was also sent to her containing a declaration that she was possessed of separate estate, but which she

Statement. refused to execute and had destroyed, as she said she did not think she was in a position to make it.

The learned Judge delivered the following judgment:—

ROBERTSON, J. :—

In the first place I find that the defendant Annie Hacking had no personal or other property as separate estate, and that she did not contract with reference to any separate property or estate. I also find that the plaintiff knew such to be the case, or should have so concluded, from the fact that she refused to make any declaration or statement in regard to being possessed of separate estate. I also find that the plaintiff accepted the notes knowing that she refused to enter into a contract in respect of any separate estate. I think the action must be dismissed with costs.

In *Mulcahy v. Collins*, 24 O. R. 441, it is laid down and declared to be the law that the property must be such as may be of a commercial character. What I understand by that is that the property that may be called separate estate must be of that character which is understood to be commercial property, and not at all such as a wedding ring, or the clothing of a married woman, or like property, not subject to alienation. It is just such property as she could convert into money and could trade in or with. That is my view of the law, and was my view at the time that case was disposed of. It struck me as strange the plaintiff's counsel should go into the question of the jewellery, and the clothing, and the sealskin jacket, and the cruet, and the spoons, and the bedding, and things of that kind. *Mulcahy v. Collins* is a decision that is binding on me beyond all question. Until that case is overruled I must hold that no case has been made out here to shew that the defendant Annie Hacking had any separate estate whatever at the time she endorsed the promissory notes sued on.

It is not necessary to go into any other matter; but I dismiss the action with full costs of suit.

The plaintiff moved on notice to set aside the judgment entered for the defendant, and to have the judgment entered in his favour. Argument.

On January 24th, 1896, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ., *C. Elliott*, supported the motion. The proper conclusion from the evidence is, that the defendant Annie Hacking was possessed of separate estate at the time she endorsed the notes. The defendant contended that the wedding presents, which were valuable, and consisted of plated-ware, etc., had been sold under an execution to satisfy a judgment against the husband, but the evidence did not clearly shew what was seized and sold under this execution, and, they being the property of the wife, it will be assumed that they were not sold to satisfy the husband's debt. But, even assuming that they were so sold and became the property of the father, the property still owned by her was sufficient to constitute separate estate under the statute. The sealskin jacket was in itself a valuable article, and which only people of means are able to possess, and the cases even go so far as to hold that the rings and watch would be sufficient. The learned Judge disposed of the case on the ground that the property must be looked at from a commercial point, but this is not the result of the cases; the question to be decided is, was she possessed of property which would be deemed her separate property if she were a *feme sole*: *Mulcahy v. Collins*, 24 O. R. 441; *Re Armstrong, Ex p. Gilchrist*, 17 Q. B. D. 167; *Bonner v. Lyon*, 38 W. R. 541; *Sweetland v. Neville*, 21 O. R. 412; Articles in Solicitors' Journal, vol. 35, p. 524, vol. 37, p. 419.

Maybee contra. The whole question is one of evidence. The plaintiff made defendant her witness, and she proved that the articles had been bought by the father under the execution against the husband. There was no obligation incumbent on the wife at the time of the sale, to claim the goods seized and sold to the father, and they clearly passed to the father. The only goods, therefore, owned by the wife at the time of the endorsement were the rings, the

Argument. watch and chain, and wearing apparel. It would be going beyond all the decisions to hold that property of this kind could be held to be separate estate, with regard to which she can be deemed to have contracted. In all the cases the separate property has been shewn to have been of a valuable character, and, not as here, articles in which their chief value lay in the associations attached them. It would be going very far to say that a woman's wedding ring could be taken off her finger and sold to satisfy her debt. The fact, however, of her refusal to sign the statutory declaration, furnishes the strongest evidence that she did not consider she had any separate property, and therefore did not contract with reference to any when she endorsed the notes: *Everett v. Paxton*, 65 L. T. N. S. 383; *Braunstein v. Lewis*, 65 L. T. N. S. 449; *Leak v. Driffield*, 24 Q. B. D. 98.

C. Elliott, in reply. No presumption can be raised from the wife's refusal to make the declaration, as the Court cannot consider what was passing in her mind.

January 27, 1896. The judgment of the Court was delivered by

ARMOUR, C. J. :—

It is a fair inference, I think, from the evidence that all the goods the female defendant received as presents at the time of her marriage in October, 1880, were seized and sold under execution against her husband at the suit of her father in 1889, that she acquiesced in and assented to the sale of the said goods to her father, and at her father's death intestate she accepted the said goods as part of the share of her father's estate to which she was entitled.

The only property, therefore, which she had, which could be called separate estate in November, 1894, was her engagement and wedding rings, and her watch and chain, and clothing.

The sum which she contracted to pay, if her contract was a valid one, was the sum of \$440, and having regard

to the nature of this property, and to its value, I do Judgment. not think that she can reasonably be deemed to have contracted with regard to it, but the contrary. Armour, C.J.

The case of *Leak v. Driffield*, 24 Q. B. D. 98, determines that she could not reasonably be deemed to have contracted with respect to her clothing, and I do not think that she would be reasonably deemed to have contracted with respect to her engagement and wedding rings, and her watch and chain, those being merely articles of personal adornment, and presumably of small value: *Braunstein v. Lewis*, 65 L. T. N. S. 449; *Bonner v. Lyon*, 38 W. R. 541; *Harrison v. Harrison*, 13 P. D. 180; *Everett v. Paxton*, 65 L. T. N. S. 383.

The motion must be dismissed with costs.

G. F. H.

HALSTED V. THE BANK OF HAMILTON.

Banks—Bank Act—53 Vict. ch. 31, secs. 74-75—Security Form C—“Negotiation”—Invalidity—Assignee for Creditors.

A bill or note taken by a bank on acquiring a security in form C to the “Bank Act,” 53 Vict. ch. 31, secs. 74-75 (D.), is not “negotiated” at the time of the acquisition thereof within the meaning of the latter section, when the person giving the security and to whose account the proceeds of the bill or note are credited, is not at liberty to draw against them except on fulfilling certain other conditions; and such security not being registered is void under the Chattel Mortgage Act against his assignee for creditors under R. S. O. ch. 124.

THIS was an action brought by the assignee, under R. S. Statement. O. ch. 124, of the estate of a customer of a bank against the bank.

The question was as to the validity of three securities, in form C. to the Bank Act, 53 Vict. ch. 31 (D.), given to the defendants by one Zoellner. These securities, which were assignments of goods were dated 1st April, 1895, 29th May, 1895, and 23rd July, 1895, and purported to secure \$4,000,

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Statement. \$4,000 and \$3,670, for which the promissory notes of Zoellner were taken, payable on demand respectively.

There had been other business arrangements between Zoellner and the defendants, who were his bankers, but on 5th December, 1894, a new arrangement was entered into, more fully set out in the judgment, the result of which was that at the end of March, 1895, Zoellner had with the defendants three accounts, his drawings against which were restricted under the arrangement mentioned in the judgment, viz., No. 1, or his general account, which was balanced by the withdrawal of a few dollars to his credit; No. 2, or special account, to the credit of which were to be placed from time to time proceeds of drafts or notes of customers discounted or on collection, and to which were debited such of these as were not paid, the amount at credit at the end of March being \$7,961.93; and No. 3, or guarantee account to which, by arrangement, was placed ten per cent. of the bills discounted or left for collection, as collateral security for past and future advances, and which at the last mentioned date had \$727.85 at credit.

The action was tried before MEREDITH, C.J., without a jury, at London on 16th January, 1896.

Gibbons, Q.C., for the plaintiff. These assignments are not bills of sale. If they are not good as securities under the Bank Act they are invalid under the Chattel Mortgage and Bills of Sale Act. "Negotiating" must mean debt incurred.

J. J. Scott, for the Bank of Hamilton. The assignments were taken to provide money for Zoellner's business to be paid out to his creditors other than the defendants. A present advance is provided for: Bank Act, sec. 75 of 53 Vict. ch. 31 (D). Zoellner's assignee has no higher right than he had: *Re Monteith, Merchants Bank v. Monteith*, 10 O. R. 529. See also *Tennant v. The Union Bank of Canada*, [1894] A. C. 31; and *The Bank of Hamilton v. Sheppard*, 21 A. R. 156.

The learned Chief Justice reserved his decision and subsequently delivered the following judgment, having first set out the arrangement and working of the accounts in detail.

Judgment.
Meredith,
C.J.

February 20th, 1896. MEREDITH, C. J.:—

No money was paid by the defendants to Zoellner at the time the assignments were made, but the respective sums for which, as I have said, promissory notes were taken from him payable on demand were placed to his credit in account No. 1 on the respective days on which the assignments were made, except in the case of the July note, the amount of which was credited on the 24th of July; but though the amounts of these alleged advances were so credited and there were the large sums I have mentioned standing at his credit in accounts Nos. 2 and 3, which so far as the defendants' books shewed, he was entitled to, Zoellner was not in a position to draw any part of these moneys; he could draw nothing from accounts Nos. 2 and 3, because under his arrangement with the defendants the moneys at the credit of those accounts were held by the bank as security for his indebtedness, and he could draw nothing from account No. 1 unless he brought to the defendants bills drawn on, or notes of, his customers for the amount he desired to obtain; because that was, according to the evidence, part of the bargain he had made with the defendants, and his position at the date of the assignment to the plaintiff was that though he then had nominally at his credit no less a sum than \$9,697.40, made up of \$3,228.56 at the credit of account No. 1: \$4,454.78 at the credit of account No. 2: and \$2,014.06 at the credit of account No. 3, he could not draw a farthing of this large sum because of the arrangement which he had made with the defendants.

It is true, as pointed out by Mr. Scott, that an amount almost equal to the so-called advance of the 1st of April, 1895, was checked out by Zoellner from his account No.

Judgment.
Meredith,
C.J.

1 between that date and the 1st of May following, and that an amount almost equal to the so-called advance of the 29th of May, 1895, was checked out of the same account between that date and the 22nd of June following, but it will be observed that in each case the balances at the credit of Zoellner in account No. 2 were, during the same periods, increased by corresponding amounts, so that there was no substantial alteration of the state of his account between the dates referred to.

Is it possible that the assignments can, under the circumstances I have mentioned, be supported as against the creditors of Zoellner under the provisions of the sections of the Bank Act upon which the defendants rely (sections 74 and 75) and which alone can give them validity as against creditors?

Section 74 authorizes the bank to "lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture." And section 75, so far as it applies to the circumstances of this case, prohibits the bank acquiring or holding any security under section 74 "to secure the payment of any bill, note or debt, unless such bill, note or debt is negotiated or contracted at the time of the acquisition thereof by the bank."

Though in form it was otherwise, there was no debt contracted by Zoellner at the time the assignments were respectively acquired by the defendants, nor was there, in my opinion, any negotiating by him of a bill or note such as section 75 contemplates.

How, under the circumstances I have mentioned, can the transactions of the 1st of April, 29th of May, and 23rd of July be treated as anything but mere book-keeping entries, having no real foundation to support them, and is it possible to come to any other conclusion than that they were merely clothed with the form which would apparently give them validity, while in substance and in fact they were intended to accomplish that which the Bank Act forbade being done?

It is, I think, impossible to treat any of the notes which the assignments purported to secure as having been "negotiated," in the sense in which that term is used in section 75, at the time the assignments were made: it is true that the form was gone through of taking the notes and passing the amount of them to the credit of one of the accounts, but contemporaneously with this an equal amount was placed to the debit of another of the accounts, and not a farthing of the amounts which the notes represented could be touched by Zoellner or made available by him for any purpose unless he should bring to the defendants and leave for collection or discount customers' paper, which would entitle him to credit in account No. 2 for an amount equal to that which he proposed to withdraw.

Judgment.
Meredith,
C.J.

The decision in *In re Carew's Estate Act*, 31 Beav. 39, is, I think, not applicable to this case. In that case a banker was held to be a holder for value of certain bills of exchange, although the account of the customer, from whom they were received, was overdrawn and the amount of the bills simply carried to his credit, and though no money was actually paid, and the result of the decision probably was to determine that the bills had been negotiated at the time the banker received them, but not, as I have endeavoured to point out, negotiated in the sense in which section 75 of the Bank Act uses the term "negotiated."

The policy of the Act, as I understand it, is to permit a bank to take security by means of such assignments as those in question in this case for an obligation incurred to it at the time the security is given and for that only. That is, I think, apparent from the language of section 74, which is the enabling section and authorizes the security to be taken where money is lent by the bank, and the language of section 75 must be read in the light of that provision. It is, therefore, the payment of a bill or note which the bank obtains in, or a debt which is incurred to it arising out of, a transaction in the nature of a loan by the bank to its customer which may be secured in the exceptional manner in which the Act permits security to be given.

Judgment.**Meredith,
C.J.**

Having come to the conclusion that no loan or real advance was made by the defendants to Zoellner at the time the assignments in question or either of them were made, and that no real debts were then incurred by Zoellner, it follows, in my view of the law, that the assignments are invalid as against the creditors of Zoellner so far as they are sought to be supported under the provisions of the Bank Act.

It was urged by Mr. Scott that even if invalid under the Bank Act, the assignments were good as against Zoellner, and being good against him were also valid as against the plaintiff; but it is impossible to give effect to that contention. The provisions of the Bank Act not being available to support the assignments, they must stand or fall according to the general law of Ontario applicable to such instruments, and not being registered, they are, under section 38 of the Bills of Sale and Chattel Mortgage Act, 1894, void as against the plaintiff, who is an assignee for the general benefit of creditors within the meaning of the Act respecting Assignments and Preferences by Insolvent Persons.

There must be judgment declaring the assignments, and each of them, to be void as against the plaintiff and the defendants must pay the costs of the action.

G. A. B.

[DIVISIONAL COURT.]

ANDERSON ET AL. V. GRAND TRUNK RAILWAY COMPANY.

Railways—Passenger—Ticket—"Station"—Access to—Expropriation of Land—Use of Railway Lines—Necessity—Invitation—Passenger Lawfully upon the Railway—Negligence—Passing Train—Neglect to give Warning—Liability.

The plaintiffs' testator, the purchaser of a ticket from the defendants entitling him to travel on their railway from a certain station to the station nearest his place of residence, took a train from the former to the latter station, although notified by the defendants that it would not go beyond a crossing station, some miles short of his destination by rail, and leaving the train at the crossing station he proceeded to walk home by the railway track, and, going westward and while within a short distance of a highway to the east of the crossing station, he was struck and killed by a following train, which on approaching the highway had omitted to give the statutory warning.

The defendants sold tickets to the crossing station from all their regular stations and received passengers commencing their journey at it; but, although they had the power to expropriate, they had provided no means of access to or from the station and the nearest highways, except their tracks, which they had permitted passengers to use:—

Held, that all persons, whether travelling on a highway or not, are entitled to the benefit of the provisions of section 256 of the "Railway Act," requiring warning by bell or whistle on approaching a highway; and that the deceased had a right to travel on his ticket to the crossing station, which the defendants had recognized as a station, and, being lawfully there, had the right to egress from it, and by necessity to be upon the track, to which the defendants had impliedly invited him, and that the neglect of the statutory provision was evidence of negligence to go to the jury.

THIS was an action, under Lord Campbell's Act, R. S. O. Statement. ch. 135, brought by the personal representatives of one William McKenzie, who was struck by a train of the defendants while walking upon a railway track, and killed.

The action was tried before MEREDITH, C.J., with a jury, at London, on the 14th January, 1896.

The main line of the defendants' railway from Point Edward crossed the line of their railway from London to Wingham at Lucan Crossing, at which there was on the main line an embankment through which the line from London to Wingham was carried, the rails on the main line being some twenty feet above the rails on the London and Wingham line. At the foot of the embankment and at the east of the London and Wingham line there was a

Statement. building, part of which was occupied by a servant of the defendants, and another part of it used as a waiting room for passengers. Between this building and the rails was a platform for passengers to alight upon from and to go from upon the cars, and from this platform there was a stairway to the top of the embankment, where there was a platform on the south side of the main line for passengers to alight upon from and to go from upon the cars. The lands of the defendants at this crossing consisted only of the lands taken for these railway lines, of the width of thirty-three yards. The nearest public highway to this crossing was to the eastward at a distance of twenty-five and a third rods, and to the westward at a distance of one mile and forty-six rods, and no way had been provided for passengers commencing or ending their journey at this crossing to get from or to either of these public highways, except by going along these railways, or by trespassing upon private property, the owners of which had given a public warning against so doing.

The line from London to Wingham had originally been an independent line, but had become part of the defendants' system more than ten years before this action, and the defendants had been in the habit of selling tickets at their regular stations to passengers whose destination was this crossing, entitling them to be carried to this crossing, and had been in the habit of receiving passengers commencing their journey at this crossing upon their cars at this crossing, and passengers commencing and ending their journey at this crossing had been in the habit of coming to this crossing and going away from it along these railways, on foot, without any interference on the part of the defendants.

The deceased on the 8th February, 1895, purchased a return ticket on the defendants' railway from Ailsa Craig, a station about three miles west of the crossing, to London, good for a continuous trip, and went to London accompanied by his wife, and, upon coming to the train at London for the purpose of returning, was told that the trains

on the main line had been cancelled. He, however, leaving his wife at London, as his children had been left alone, took the train to try to get home to Ailsa Craig. At Denfield, a station about three miles south of the crossing, he tried to get a conveyance to take him to Ailsa Craig, but was unable to obtain one, and went on to the crossing, and commenced to walk along the railway westward towards Ailsa Craig, and was struck by a following freight train about thirty rods from the crossing, and was killed.

Statement.

The persons in charge of this freight train were not obeying the requirements of sec. 256 of the Railway Act, 51 Vict. ch. 29 (D).*

He was advised by servants of the defendants not to attempt to walk to Ailsa Craig on account of the severity of the weather, and was told to look out for freight trains, but no objection was made to his walking upon the railway.

It was agreed that the damages should be fixed at \$3,000, to be distributed by the Court, and that, if there was any evidence of any neglect by the defendants of any duty which the defendants owed to the deceased which entitled the plaintiffs to have the case submitted to the jury, judgment should be entered for that amount; and the learned Chief Justice withdrew the case from the jury and dismissed the action.

The plaintiffs moved to set aside the judgment and to enter judgment for them for \$3,000 and costs, upon the ground that the judgment dismissing the action was contrary to law and evidence, and that the learned Judge at the trial erred in holding that the evidence adduced

* 256. The bell, with which the engine is furnished, shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals, until the engine has crossed such highway; and the company shall, for each neglect to comply with the provisions of this section, incur a penalty of eight dollars, and shall also be liable for all damage sustained by any person by reason of such neglect; and a moiety of such penalty and damages shall be chargeable to and collected by the company from the engineer who has charge of such engine, and who neglects to sound the whistle or ring the bell as aforesaid.

Statement. disclosed no negligence on the part of the defendants; and upon the ground that the evidence established that the death of the deceased was caused by a train of the defendants, and that the defendants were shewn to have neglected their duty in providing no means of egress from and ingress to their station at Lucan Crossing except by passing over the right of way and tracks of the defendants' railway; and upon the further ground that the evidence established that, with the knowledge and permission and by the license of the defendants for a number of years, the travelling public had been allowed and required to use the right of way and track of the railway as a means of access to and from said station, and that thereby the portion of the railway track in question had, to the knowledge of the defendants, acquired the character of a foot path or way of necessity largely used by passengers upon the defendants' railway, and in consequence it became incumbent upon the defendants to exercise a greater degree of caution in running their trains over the said portion of their track and to give warning at the said place of the approach of trains by sounding the whistle or ringing the bell or otherwise taking effectual means to prevent passengers necessarily walking along the said railway track from the danger of injury by trains of the defendants; and upon the ground that there was at the trial evidence which ought to have been submitted to the jury, and upon which the jury properly could find that the defendants were negligent in the premises, and that the death of the deceased was due to such negligence.

The motion was heard on the 11th March, 1896, before a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.

Aylesworth, Q.C., for the plaintiffs. Though the deceased knew before he left London that the train did not go on to Ailsa Craig, he had a right to get off at Lucan Crossing, just as much as if his ticket had been to the crossing, and when there he had a right to get to the high-

way by the track, because there was no other way, and Argument.
because, as the evidence shews, it was the custom to do so,
and the defendants permitted and invited it. The defendants neglected to provide a proper exit, and the deceased made use of the customary one. He was a passenger, and it made no difference whether he was crossing the railway line or going along it lengthways when he was struck. The defendants owed him the duty of active vigilance, and, instead of exercising it, they did not even discharge their statutory duty of ringing the bell or sounding the whistle. If they had done so at the highway crossing to the east, he would have had warning. There was evidence of negligence to go to the jury, and the plaintiffs should recover under the agreement made at the trial. I refer to *Slattery v. Dublin, etc., R. W. Co.*, Ir. R. 8 C. L. 531, 10 C. L. 256, 3 App. Cas. 1155; *Thomson v. North British R. W. Co.*, 4 Ct. of Sess. Cas., 4th ser., 115; *Thompson on Negligence*, pp. 453, 455, 461; *Coburn v. Great Northern R. W. Co.*, 8 Times L. R. 31 n.; *Crowther v. Lancashire, etc., R. W. Co.*, 6 Times L. R. 18; *Rogers v. Rhymney R. W. Co.*, 26 L. T. N. S. 879; *Wright v. Midland R. W. Co.*, 1 Times L. R. 406; *Brown v. Great Western R. W. Co.*, *ib.* 614; *Parsons v. New York Central R. R. Co.*, 113 N. Y. 355; *Collins v. Toledo, etc., R. W. Co.*, 80 Mich. 390; *Byrne v. New York Central R. R. Co.*, 104 N. Y. 362; *Barry v. New York Central R. R. Co.*, 92 N. Y. 289; *Am. & Eng. Encyc. of Law*, vol. 4, p. 915; *Stewart v. Pennsylvania R. R. Co.*, 14 *Am. & Eng. R'way. Cas.* 679, and note at p. 681; *Patterson's Railway Accident Law*, secs. 251-254; *Nicholson v. Lancashire, etc., R. W. Co.*, 3 H. & C. 534. The case of *Jones v. Grand Trunk R. W. Co.*, 16 A. R. 37, is not against the plaintiffs: see *S. C.*, 18 S. C. R. 696. Contributory negligence is not in question here.

Osler, Q.C., for the defendants. The contract was to carry the deceased by rail for a continuous trip from London to Ailsa Craig. He was warned at London that he could not get to Ailsa Craig. He chose to disregard that and terminate his journey at Lucan Crossing. The defen-

Argument. Plaintiffs are not responsible for him as a passenger. There is no station at Lucan Crossing; it is just a junction under sec. 240 of the Railway Act. The defendants were bound to provide, and did provide, a platform, which is all they are required to do. They could not expropriate land at such a place. At any rate, the other way was the way out. The deceased should have gone east to the nearest highway, if he had any right to use the track at all. There was no invitation here and no license. Can the public force the defendants to let them use the track? By sec. 273 of the Railway Act no person is permitted to walk along the track, under a penalty. That is the defendants' protection. A custom cannot be set up against the public policy of the law. The cases relating to highways and crossings are not applicable. There is no case such as this, unless it be *Jones v. Grand Trunk R.W. Co.*, 16 A. R. 37, 18 S. C. R. 696.

Aylesworth, in reply.

April 4, 1896. The judgment of the Court was delivered by

ARMOUR, C.J.—(after setting out the facts as above):—

The only question reserved for our determination is whether there was any evidence of any neglect by the defendants of any duty which the defendants owed to the deceased which entitled the plaintiffs to have the case submitted to the jury.

And, in my opinion, the determination of this question rests upon the determination of the question whether the deceased was at the time of his death lawfully upon the defendants' railway; for, if he was, the omission by the defendants of the duty imposed upon them by the 256th section of the Railway Act was evidence of the neglect of a duty which the defendants owed to the deceased which entitled the plaintiffs to have the case submitted to the jury.

The provisions of this section are not limited in any Judgment. way, and all persons are entitled to the benefit of them, Armour, C.J. whether travelling on a highway or not. It could not well be said that a person crossing the railway from one part of his farm to another by a farm crossing furnished by the railway company would not be entitled to the benefit of these provisions; and if so, it is difficult to see how any one lawfully being upon the railway would not be equally entitled to the benefit of them.

I do not see upon what principle it could be contended that the deceased could not have terminated his journey at any station between London and Ailsa Craig, and that, having done so, he was in a worse position as to his rights against the defendants than if he had taken a ticket at London for the station at which he terminated his journey.

And I do not see upon what principle it could be contended that by going from London to Lucan Crossing and there terminating his journey by train, he was in any worse position as to his rights against the defendants than if the ticket upon which he was travelling had been from London to Lucan Crossing.

He was entitled to travel on his ticket from London to Lucan Crossing by the defendants' train, and being unable to proceed farther by the defendants' train, through no fault of his own, he was entitled to the same rights against the defendants as a passenger would have had who had travelled from London to Lucan Crossing on a ticket from the former to the latter place.

And I do not see upon what principle it could be contended that the deceased was in any worse position as to his rights against the defendants by having been notified at London of the cancellation of the trains on the main line, than if he had received no such notification until he had arrived at Lucan Crossing.

It could not be said that the deceased was unlawfully at Lucan Crossing, or that he was, when he arrived there, at a place where he had no right to be: *Parsons v. New York Central R.R. Co.*, 113 N. Y. 355.

Judgment. It was said that Lucan Crossing was not a station ; that Armour, C.J. there was no ticket nor telegraph office there ; but the defendants had made it a station by selling tickets at all their regular stations to it, and by receiving passengers commencing their journey at it, and thus recognizing it as a station.

It was said also that the defendants had no power to expropriate land necessary to give ingress and egress from and to a public highway to and from this station ; but I think that they had power for this purpose under the provisions of the Railway Act.

The deceased, being lawfully at this station, had a right to egress from it, and, there being no other mode of egress, he had a right, from the very necessity of the thing, to gain egress by the railway, and this necessity would have justified any alleged trespass.

In the same way, if a train were wrecked between stations, and there was no other way of getting to either station but by the railway, the passengers would be justified in walking along the railway to get there, and could not be accounted trespassers for so doing.

It is on the same principle, that of necessity, that, where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining land without being guilty of trespass: *Carrick v. Johnston*, 26 U. C. R. 65.

I think, moreover, that the defendants, by their conduct in selling tickets to passengers to Lucan Crossing, and in receiving passengers commencing their journey at Lucan Crossing, and in acquiescing without objection to such passengers, in going from and to such station, walking along the railway for the purpose of egress and ingress from and to the station, impliedly invited the public to walk along the railway for such purpose ; and that the latter could not be held to be trespassers under such circumstances.

I am of the opinion that the deceased, in seeking egress from this station by walking along the railway, was law-

fully upon the railway for that purpose, and was so law-
fully upon the railway at the time he was killed.

Judgment.
Armour, C.J.

In *Barrett v. Midland R.W. Co.*, 1 F. & F. 361, it appeared that the plaintiff resided at one of a row of cottages by the side of the railway, opposite to which cottages the residents and others had been in the habit for some years of crossing the line. In doing so, on the occasion in question, the plaintiff was knocked down by an engine and seriously injured. Watson, B., charged the jury that "though there was no right of way, still the circumstance of people being in the habit of passing threw upon the company the responsibility of using reasonable care before moving over that portion of their line. If you think there was negligence in the person having the conduct of the engine, or that warning in some way should be given to those crossing the line under circumstances of danger, of which they may not be in a condition to be fully conscious, the defendants will be liable."

Byrne v. New York Central R. R. Co., 104 N. Y. 362;
Barry v. New York Central R. R. Co., 92 N. Y. 289.

The defendants' counsel relied strongly upon sec. 273 of the Railway Act; but I do not think that a person walking on the railway by necessity or by the implied invitation or license of the defendants would be liable to conviction under that section.

The result, therefore, is that, in my opinion, there was evidence of neglect by defendants of a duty which the defendants owed to the deceased which entitled the plaintiffs to have the case submitted to the jury; and that there should be judgment for the plaintiffs against the defendants for the sum of \$3,000 (which we will hereafter distribute, if this judgment be not reversed), with full costs of suit.

E. B. B.

[DIVISIONAL COURT.]

RE COCKBURN.

Way—Easement—Implication—Prescription—Interruption—Unity of Possession—Unity of Seizin—"Lost Grant"—Tenancy—Estoppel.

A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage-way between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal and getting out ashes. The appellant, the owner of lot 4, had, as was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood:—

Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4.

The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1894, the owner of No. 13 was also the tenant of No. 9:—

Held, per MEREDITH, C.J., that the unity of possession during that period interrupted the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R. S. O. ch. 111. sec. 35.

Dictum of Hatherley, L.C., in *Ladyman v. Grave*, L. R. 6 Ch. 763, not followed.

But, per *Curiam*, that at all events the *locus* in question could not be treated as a way to lot 4; it was rather a way to that portion of lot 5 on which house No. 9 stood; and there being unity of seizin of the alleged dominant and servient tenements in the devisee of lot 5, no easement could exist while that unity continued; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation.

Seemle, per MEREDITH, C.J., that, but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant."

And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant.

Statement. AN appeal by William Maclean from a decision of the Master of Titles upon an application for first registration under the Land Titles Act, made by David B. Cockburn, in respect of lot 6 and portions of lots 5 and 7 on the south side of Nassau street, in the city of Toronto. The applicant desired to have the land declared not subject to sub-secs. 3 and 4 of sec. 24 of the Act, R. S. O. ch. 116.

The appeal was heard upon a case stated by the Master as follows:—

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The only question in dispute is whether William Maclean, the owner of lot 4, is entitled to a right of way over the easterly portion of the applicant's land. Maclean has filed an objection to the applicant's registration unless subject to such right.

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In May, 1874, James Ross died entitled to lots 4 and 5. He devised lot 4 to his son Frederick, and lot 5 to his son William.

James Ross had in his lifetime built a house, now known as No. 9, Nassau street, the principal portion of which was upon lot 4, but which overlapped on lot 5 to the extent of about five and a half feet, and the fence dividing No. 9 from No. 13 (a house upon the land lying adjacent to the west, and being part of lot 5) ran from the south-west corner of No. 9, cutting off a strip of lot 5. There was no house No. 11. Between Nos. 9 and 13 was a passage-way, over four feet wide, and about twenty-eight feet deep, with two gates at its southern extremity; one of these gates led into the yard of No. 9, and the other into the yard of No. 13. The passage-way and gates still occupy the same position.

Cockburn claims title as executor and devisee of one Alexander Fleming. At the time of James Ross's death, Fleming with his family occupied house No. 9 as James Ross's tenant. He had lived in this house for four or five years, and after James Ross's death continued to live in it as the tenant of Frederick Ross till June, 1884, being a further period of ten years. In March, 1884, Fleming purchased lot 5 from William Ross, and in the June following, he moved into house No. 13. While the Flemings occupied No. 9 they were accustomed to go into their yard by the passage-way above mentioned, and they used it for the purpose of getting in wood and coal and getting out ashes. It was used in common by the occupants of Nos. 9 and 13. The occupants of No. 9 also used it for the purpose of getting water from a well situate in the yard of

Judgment. No. 13, but the use for this purpose was discontinued before June, 1884, the lake water having been introduced into the houses. The passage has continued to be used for the other purposes named up to the present time by the occupants of No. 9. It is stated that the applicant desires to stand upon his rights, whatever they may be, because an offensive use has recently been made of this passage-way for the purpose of removing night-soil from No. 9. This kind of matter, it appears in evidence, had been, previous to June, 1894, removed by means of a passage-way between houses No. 5 and 7. A plan is put in shewing the position of the fence and buildings. There are no windows in the west wall of No. 9, so that no question arises as to the right to have the passage-way open for the purpose of giving light.

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William Ross's deed to Fleming is dated 1st March, 1884, and purports to convey all lot 5. He subsequently, as attorney for Frederick Ross, executed a deed, dated 13th May 1891, whereby Frederick Ross purported to convey to Maclean lot 4, together with a strip off the east boundary of lot 5 and a right of way over lot 5, by the following description: "commencing on the southerly limit of Nassau street, at the north-east angle of lot 4, distant 160 feet westerly from the west limit of Spadina avenue; thence southerly, parallel with Spadina avenue, 132 feet to the south-east angle of lot 4; thence westerly, parallel to Nassau street, 53 feet, 7 inches, to the line of an old fence; thence north 16 degrees west, parallel to Spadina avenue and along the said fence line, 62 feet to where the fence makes an angle; thence north 24 degrees, 23 minutes, west, 39 feet, 5 inches; thence north 29 degrees east, 3 feet to the south-west angle of the frame dwelling-house, being street No. 9; thence northerly, along the west end of the said dwelling-house and on a continuation of the same course, 30 feet, more or less, to the south limit of Nassau street; thence easterly, along Nassau street, 56 feet, 4½ inches, to the place of beginning; together with the right of way over the passage-way at the west end of the above mentioned dwelling-house, 4 feet, 6 inches, in

width, to a depth of 32 feet southerly from Nassau street. Judgment.

It is admitted that, by virtue of this deed and the Statute of Limitations, Maclean has acquired title to that portion of lot 5 included in the description in the deed, and this portion was excluded from Cockburn's application, but Maclean's claim to the right of way is contested.

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Maclean claims on two grounds: firstly, that Frederick Ross was entitled to the right of way by virtue of an implied grant under the will of his father, and that this right passed under Frederick's deed to him; and secondly, that he is entitled to the way by prescription, upon the ground that it has been used by him and the tenants of Frederick Ross for over twenty years from the death of James Ross, and that, as Fleming held as tenant of Ross during the whole time he occupied, he so held for the benefit of his landlord, and the fact that during part of the time he owned the servient tenement makes no difference.

As to the first point. The question of what rights pass by implied grant is not by any means clear, but, after giving the matter the best consideration that is in my power, I am of opinion that in the present case the right of way in question did not pass with the devise of lot 4 to Frederick Ross.

[The learned Master then referred to and quoted from *Pearson v. Spencer*, 1 B. & S. 571, 3 B. & S. 761; *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; *Morris v. Edgington*, 3 Taunt. 24; *Bayley v. Great Western R. W. Co.*, 26 Ch. D. 434; *Brett v. Clowser*, 5 C. P. D. 376; *Worthington v. Gimson*, 2 E. & E. 618; *Wheeldon v. Burrows*, 12 Ch. D. 31: and continued.]

The great difficulty, however, in Maclean's way is that, whatever may be surmised as to the intention of the testator, we must construe the devise of lot 4 as terminating at the west limit of that lot, so that there is a strip of land which was devised to William Ross lying between the termination of the travelled way and the land devised

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to Frederick. The effect of this, it seems to me, must be to sever the way from the land devised to Frederick, or, to speak more accurately, to negative any implication that might otherwise arise, that the easement of a way to the yard was intended to be created in order to be enjoyed with Frederick's land. No grant of a way over the strip in question can be implied, and such an implication would be necessary to give an entrance by the way in question to the land devised to Frederick. It seems to me the same principle must apply as would have been applicable had the west half of the premises, known as No. 9, been specifically devised to William.

In Gale upon Easements, 6th ed., at p. 123, it is said: "It is not clear that such a way will pass if the only 'apparent sign' be the state of the road on the quasi-servient tenement itself. A hard and gravelled road is indeed 'apparent;' but it is in this case a part, not of the tenement conveyed, but of the tenement retained, and it cannot be said that such a way, by reason merely of its 'apparent' nature, is necessary to the use of any part of the tenement conveyed. But where the 'apparent sign' of user is a part, not of the tenement retained, but of the tenement conveyed,—such as a substantial and permanent doorway, or a formed road extending over both tenements,—there is authority for saying that the doctrine of implied grant applies."

Upon this principle the apparent sign should appear in the dominant tenement.

In this case the gate, the apparent sign of the right of way, is, in consequence of the devise to William of the strip, not upon the dominant, but upon the alleged servient, tenement.

The case of *Kerr v. Coghill*, 25 Gr. 179, was one where, by virtue of the Short Forms of Conveyances Act, all out-houses, easements, and appurtenances passed by express grant, and the principles governing implied grants had not to be invoked.

Second: as to Maclean's right by prescription.

It is clear upon the evidence that the way in question has been actually used in connection with No. 9 ever since the death of Mr. James Ross in May, 1874, being a period of over twenty-one years, and Mr. Middleton, upon Mr. Maclean's behalf, contended that, although part of this time Fleming was owner of the servient premises, this was immaterial, because he must be taken to have used the way during this time on behalf of his landlord, as a right appurtenant to the dominant premises, and not by virtue of the ownership of the servient premises. I do not see how it is possible, in view of the authorities, to give effect to this contention. I have referred to a very great number, but the leading cases on the subject are the following :—

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[Reference to and quotations from *Onley v. Gardiner*, 4 M. & W. 496 (1838); *Harbidge v. Warwick*, 3 Ex. 552 (1849); *Winship v. Hudspeth*, 10 Ex. 5 (1854); *Battishill v. Reed*, 18 C. B. 696 (1856).]

These cases, which, ever since their decision, until Lord Hatherley used the language hereafter referred to in *Ladyman v. Grave*, L. R. 6 Ch. 763, had been recognized as law, seemed clearly to establish that the time during which dominant and servient premises are held in unity of possession is not computed in making up the statutory period, and also that such unity put an end to the running of the statute altogether, as during that period the right is not enjoyed as an easement. It had also been settled as the proper interpretation of the statute that the twenty years required to make up the statutory period was the twenty years next before the action wherein the claim is brought in question, so that an interruption or a cessation of user which excludes an inference of actual enjoyment as of right, at the beginning, middle, or end of the period, is fatal to the running of the statute: *Wright v. Williams*, 1 M. & W. 77 (1836); *Richards v. Fry*, 7 A. & E. 698 (1838); *Ward v. Robins*, 15 M. & W. 237 (1846); *Hollins v. Verney*, 13 Q. B. D. at p. 314 (1884).

In all the cases I have seen where the question of unity

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of possession has been raised, the union lasted for considerably more than a year, so that the application of the 4th section of the English Act (sec. 37 of our Act) to such a case was not raised.

One would naturally suppose that, since an actual obstruction for less than a year does not stop the running of the statute, unity of possession for less than a year (in cases where there has not been a merger) ought not to have this effect; but, since such a unity is held to be a cesser of the enjoyment as an easement, it must break the continuity unless this is saved by sec. 37. This, of course, must depend upon whether or not it is an interruption within the meaning of that section. Judicial opinion seems to me adverse to this view, reasonable as it would at first sight appear, and seems to establish that "interruption" in this section means some positive adverse obstruction, and not a break in the use.

[Reference to. *Onley v. Gardiner*, 4 M. & W. at p. 497 (1838); *Flight v. Thomas*, 11 A. & E. 688 (1840); *Carr v. Foster*, 3 Q. B. 581 (1842); *Harbidge v. Warwick*, 3 Ex. 552 (1849); *Ladyman v. Grave*, L. R. 6 Ch. 763 (1871); *Hollins v. Verney*, 13 Q. B. D. 304 (1884).]

In view of the principles established by these cases, I would have felt no difficulty in deciding this case were it not for the language used by Lord Chancellor Hatherley in *Ladyman v. Grave*, L. R. 6 Ch. at p. 768, which seems entirely inconsistent with them. He says: "The accruing right to the easement is suspended, but only suspended, during the union of the possession. So that if it had been shewn that the enjoyment had lasted for fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such a case an enjoyment for twenty years could have been pleaded. The interruption (if such it may be called) by the unity of possession is not an interruption in the sense indicated by the statute, which means an adverse interruption."

I have not been able to find any case where this statement of the Lord Chancellor is recognized as a correct exposition of the law.

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[Reference to Gale upon Easements, 6th ed., p. 163, note (f); Goddard on Easements, 4th ed., p. 242; Herbert on Prescription (1891), p. 41.]

The principle laid down by Lord Hatherley in the language cited was in no way requisite for the decision of *Ladyman v. Grave*.

I think I am bound to follow the decided cases, notwithstanding the dictum of so eminent an authority as Lord Hatherley.

[Reference to *Hollins v. Verney*, 13 Q. B. D. at pp. 307, 313.]

I have seen no case in which any distinction is made as to the effect of unity of possession, where the dominant tenement is held by a tenant who during his tenancy acquires possession of the servient tenement, and the converse. *Ladyman v. Grave* was in that respect similar to the present case, as there the tenant of the dominant tenement, during his tenancy, acquired possession of the servient tenement. Stuart, V.-C., in the judgment which was reversed by Lord Hatherley, suggested that this might make a difficulty, but Lord Hatherley points out very clearly that the landlord has no right of any sort or description anterior to the lapse of twenty years.

As the authorities at present stand, I am bound to decide adversely to the claim made by Maclean.

Maclean's appeal from this decision was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE and MACMAHON, JJ., on the 10th February, 1896.

Shepley, Q. C., for the appellant.

W. Mortimer Clark, Q. C., for David B. Cockburn, the respondent.

The arguments of counsel and the cases cited are referred to in the principal judgment.

Judgment. February 29, 1896. MEREDITH, C. J.:—

Meredith,
C.J.

I agree with the Master of Titles that a right of way over the *locus in quo* did not pass by implication of law to the devisee Frederick Ross, by the will of his father.

Assuming the right of way in question to have been one of an apparent and continuous character, which would, according to the case of *Phillips v. Low*, [1892] 1 Ch. 47, have passed to Frederick by implication of law if the devise to him had been of the whole of house No. 9, I am unable to see how that result can follow in this case, having regard to the manner in which the testator has disposed of his property by the will.

The reason why such a right is held to pass is that it is either essential to the enjoyment of the tenement in connection with which it is used, or, if not essential, that the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state in which it is when devised, upon the adjoining tenement, and, therefore, is presumed to be intended to pass with the tenement when devised.

Such a presumption cannot, as it appears to me, arise, but is negatived, where, as here, the testator draws the dividing line between the two adjoining parts of the property which he devises, so that part only of a house which is so dependent forms the subject of one devise, and the remainder of it, together with the adjoining property of the testator, the subject of the other, and the *locus* over which the right of way is claimed is included in the latter, and does not touch the land which is the subject of the former devise.

That division of the property demonstrates that the testator did not intend that the subjects of his two devises should be enjoyed in the condition in which they were, but that they should be enjoyed by his devisees under new conditions, with which the maintenance of the way as it had been before used is, I think, entirely inconsistent.

The first ground upon which the appellant's claim was rested therefore fails.

As far as the case depends upon the second ground upon which it is sought to be maintained, that of a right to the way as an easement acquired by prescription under the provisions of R. S. O. ch. 111, sec. 35, the question turns upon whether the fact that Fleming from the 1st March, 1884, until the month of June following, while occupying house No. 9, the alleged dominant tenement, as tenant of Frederick Ross, was also the owner in fee of house No. 13, the alleged servient tenement, precludes the appellant from relying upon an enjoyment of the way which would otherwise (apart from a question not apparently argued before the Master, to which I shall refer later on) be sufficient to prevent his claim being defeated or destroyed, that enjoyment having continued for upwards of twenty years.

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Meredith,
C.J.

The Master has held that it does; his opinion being that the combined effect of secs. 35, 37, and 38, according to the interpretation by judicial decision of the corresponding sections of the English Act [2 & 3 Wm. IV. ch. 71, secs. 2, 4, and 5], is to render it necessary that the twenty years' enjoyment, to be effectual for the purposes of sec. 35, should be an enjoyment of the easement as such, continuous and under a claim of right, and the period of it be that next preceding some action wherein the claim is brought in question, that being assumed to be, in this case, the proceedings which have resulted in this appeal.

The reasons for that opinion are given by the learned Master in a careful statement prepared by him, in which the authorities are considered with the result I have mentioned.

It is clearly settled law that where there is a union of seizin of the dominant and servient tenements, easements are thereby extinguished, if the estates in the two tenements be of an equally "high and perdurable" character, but where that is not the case, there is not an extinguishment, and the easement is merely suspended during the unity, and revives upon a severance of the tenements

Judgment. afterwards taking place: Gale on Easements, 6th ed., p. 502 *et seq.*; and cases cited in note (b) to p. 503.
Meredith,
C.J.

That the twenty years' enjoyment for the purposes of sec. 35 must be of the easement as such and of right, was stated by the Court in *Bright v. Walker*, 1 C. M. & R. 211 (1834), and was affirmed in *Monmouthshire Canal Co. v. Harford*, *ib.* 614; *Tickle v. Brown*, 4 A. & E. 369 (1836); *Beasley v. Clarke*, 2 Bing. N. C. 705 (1836); *Onley v. Gardiner*, 4 M. & W. 496 (1838); *Battishill v. Reed*, 18 C. B. 696 (1856).

It was, however, contended by Mr. Shepley that, as the unity of possession, if it existed in this case, continued only from the 1st March to the following June, the appellant was entitled to add the period of enjoyment prior to the 1st March to that subsequent to June, and that together these periods made up the twenty years required by sec. 35; and in support of his contention he cited and relied on *Ladyman v. Grave*, L. R. 6 Ch. 763 (1871), where Lord Hatherley, then Lord Chancellor, according to that report of the case, gave expression to an opinion that what is contended for may be done. Though it may be doubted whether the opinion attributed to Lord Hatherley was really expressed by him: see the reports of the case in 25 L. T. N. S. 52; 19 W. R. 863: it was, as is pointed out by some of the text writers, an *obiter dictum*, and was expressed without a full argument of or citation of the authorities bearing upon the question with which it dealt.

The previously decided cases certainly run counter to it, and appear to establish two propositions which are inconsistent with it.

The first of these propositions I have already referred to—that the enjoyment must be of the easement as such and of right, and that there can be no such enjoyment while the unity of possession exists, and to that Lord Hatherley himself agrees: p. 767.

The second proposition is that the twenty years' enjoyment required by sec. 35 must be continuous, and must also be those next preceding the action in which the right is brought in question.

Section 37 (sec. 4 of the English Act) requires that the period of years mentioned in the three preceding sections be the period next before some action. Surely that means the whole period and excludes two periods, one of which, being less than twenty years, is next before, and the other, which is required to make up the full twenty years, is separated from it by another period, the length of which is measured by the duration of the unity of possession, which happens in this case to be but a few months, but which, if the method of reckoning contended for be allowed, may be greater even than the whole of the requisite statutory period.

Judgment.

Meredith,
C.J.

The cases prior to *Ladyman v. Grave* which, in my view, establish the second proposition, I will now briefly refer to.

Onley v. Gardiner, *supra*, decided in 1838, in which Baron Parke, delivering the judgment of the Court, said: "We are all clearly of opinion, that in order to entitle the defendant to the benefit of the statutory plea, it must be an enjoyment of the easement as such, and as of right, for a continuous period of twenty years next before the suit:" pp. 499, 500. And again: "No such absurdity or inconsistency would follow from this construction; on the contrary, to hold that the words might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which the presumption of a grant never could have existed before the statute." And again: "A similar reason applies to intervals of unity of possession, during which there is no one who could complain of the user of the road." And further on (pp. 500-1) he said: "It appears to us, therefore, that according to the words and meaning of the Act, the enjoyment of the easement must be continuous."

Tickle v. Brown, *supra*, where the necessity of the continuity of the period of enjoyment is recognized: p. 384.

Judgment.

**Meredith,
C.J.**

Battishill v. Reed, supra. The plaintiff in that case had enjoyed the way, the right to which was in question, without interruption from 1800 to 1855, when the action was brought; but it was held that his claim to it under the statute was defeated by a unity of possession from 1848 to 1853, the same tenant having occupied both premises during that period. Mr. Justice Crowder at the trial had ruled that the fact of the unity of possession for part of the time prevented the application of the statute; and in refusing a rule *nisi* for a new trial, moved for on the ground that this ruling was erroneous, Jervis, C. J., said: "The statute contemplates a continuous enjoyment of the easement claimed, as of right, for twenty (or forty) years next before the commencement of the suit, without interruption acquiesced in for a year. In the present case, there was an interval of ten years, when there was no user at all. In computing the period, that interval cannot be cut out. In other parts of the statute provision is made for the exclusion of certain periods from the computation: but, under secs. 2 and 4, the user must be continuous and ending next before the commencement of the action or suit:" p. 705. And Mr. Justice Cresswell said, at p. 706: "The statute requires a forty years' continuous user, and forty years next before the commencement of the suit. Here there was an interval during the forty years next before the commencement of the action when there was no user as of right."

Parker v. Mitchell, 11 A. & E. 788 (1840). In this case the defendant gave evidence of user from a period of fifty years before the commencement of the suit, and from that onwards till within four or five years of the bringing of the action, but not of user during these latter years. Mr. Justice Coleridge at the trial directed the jury to find for the plaintiff on a plea of forty or twenty years' user under the statute, and the jury so found. The Court *en banc* refused to disturb the verdict, holding that the direction of the Judge was right.

Lowe v. Carpenter, 6 Ex. 825 (1851), in which the Court approved of and followed *Parker v. Mitchell*.

See also *Outram v. Maude*, 17 Ch. D. at p. 405 (1881).

There are other cases besides those which I have dealt with which go to sustain the second proposition, but it is, I think, unnecessary to refer to them.

In *Hollins v. Verney*, 13 Q. B. D. 304 (1884), the Court of Appeal had to consider the meaning of the expression "enjoyment for the full period of twenty years," used in sec. 2 of the English Act; and Lord Justice Lindley, in delivering the judgment of the Court, referred to and considered many of the cases, including all of those to which I have referred, and reached the conclusion that it is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the dicta to be found in them: p. 315: and at p. 309 he says: "The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the Court sees that having regard to sec. 6 and the other provisions of the statute there is no evidence on which the jury can properly find such enjoyment."

Mr. Shepley relied very much on this language of the Lord Justice, and argued that a jury might properly, on the evidence in this case, be left to find whether the enjoyment had been continuous for the full period of twenty years next before action.

Some ground for that contention is certainly to be found in the reference to the case of *Carr v. Foster*, 3 Q. B. 581 (1842), as to which it is said: "At the same time it is difficult to reconcile this case with *Parker v. Mitchell*, and with those cases already referred to in which it has been held that a way actually used for twenty years before action has not been enjoyed for those twenty years as of right, if for any part of that period the dominant and servient tenements have been occupied together. In the one case there has been a total cessation of user for a time, and in the other there has been no cessation of user at all, but only a cessation of the user as of right. Why

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a temporary cessation of user as of right should be more fatal to the acquisition of the right than a total temporary cessation, it is not easy to see : " pp. 312-3. But, as it appears to me, the Lord Justice himself furnishes the answer : at p. 311 he says that the non-user must be "capable of explanation consistently with continued actual enjoyment as of right : " and at p. 314 : " The total absence of user for any year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continual actual enjoyment notwithstanding such temporary non-user." Such an explanation, as is pointed out, was given in *Carr v. Foster*—where the absence of actual user for two years was explained by the fact that the person claiming the right of common of pasture in question there, had during that period no commonable beasts—and in the other cases which are referred to or put by way of illustration in the opinion of the Lord Justice ; but in the case of unity of possession there can be no such explanation given or inference drawn, because the user, to be of any avail, must be of the easement as such and as of right, which it cannot be while the unity exists ; what is then done being so done by the occupier in the exercise of his right in the soil itself, and not in the enjoyment of any right in the nature of an easement over it.

The cases cited to Lord Hatherley in *Ladyman v. Grave* in support of the contention that the two periods of enjoyment might be added together to make up the statutory period of twenty years, were *Clayton v. Corby*, 2 Q. B. 813 (1842), and *Pye v. Mumford*, 11 Q. B. 666 (1848).

In *Clayton v. Corby* the defendant claimed by prescription under the statute, and it was held that the thirty years' enjoyment required by sec. 1 might be proved by shewing that the party claiming had enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such intervened), the estate over which the right had been exercised was in the hands of a tenant for life.

That decision depended on the provisions of sec. 7 (sec. 40 of our Act), which provides that "the time during which any person otherwise capable of resisting any claim * * is * * tenant for life * * shall be excluded in the computation of the period. in the said sections mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible." And the Court likened the case to the provision that a writ of *capias ad satisfaciendum* must lie in the office, in order to fix the bail, the last four days before the return, exclusive of Sunday; and said that if the plaintiff's construction of the words of the Act, which was that if there should be a tenancy for life during any part of the thirty years, the term of that tenancy was to be excluded, and the thirty years could not be computed at all, was right, it would, by parity of reasoning, be impossible to fix bail when a Sunday was one of the actual four days before the return of the writ.

Judgment.
Meredith,
C.J.

That case is manifestly no authority to support Lord Hatherley's dictum, for the construction placed upon the section depended, as I have said, upon the provisions of sec. 7, which excluded from the computation of the thirty years the period during which the tenancy for life existed; and there is no such provision as to a suspension of an easement arising from unity of possession.

It will be observed that the reasoning of the Court to which I have referred indicates that in its view the period of thirty years, to be effectual for the purposes of the statute, must be a continuous one.

Pye v. Mumford, 11 Q. B. 660, decided only that where to a declaration in trespass the defendant pleaded enjoyment as of right for thirty years next before the commencement of the action, and the plaintiff simply traversed such enjoyment, he could not support the traverse by proof that, though there was that enjoyment, yet, for a period of time, without including which there would not be a thirty years' enjoyment, there was a tenant for life of the *locus in quo*.

Judgment.

Meredith,
C.J.

Mr. Shepley also referred to and relied on *Simper v. Foley*, 2 J. & H. 555 (1862), a decision of Lord Hatherley when Vice-Chancellor; but that was the case of an easement of light, to which sec. 2 has been held not to apply, but which is governed by the provisions of sec. 3, which, although a contrary opinion was expressed in *Harbidge v. Warwick*, 3 Ex. 552 (1849), it is now settled, does not require that the enjoyment be "of right:" *Truscott v. Merchant Tailors' Co.*, 11 Ex. 855 (1856); *Frewen v. Phillips*, 11 C.; B. N. S. 449 (1861); *Tapling v. Jones*, 11 H. L. C. 290 (1865); *Mitchell v. Cantrill*, 37 Ch. D. 56 (1887); *Perry v. Eames*, [1891] 1 Ch. 658; *Robson v. Edwards*, [1893] 2 Ch. 146; *Wheaton v. Maple*, [1893] 3 Ch. 48.

In these cases the exceptional position of easements of light under the statute and the difference between secs. 2 and 3 are pointed out.

Ladyman v. Grave, I may here observe, was also a case in which an easement of light was claimed.

I am of opinion, therefore, that, notwithstanding the great weight which must be given to any expression of judicial opinion by Lord Hatherley, I am bound to follow the decided cases to which I have referred, and which seem to me to correctly interpret the language used by the Legislature in the enactment with which they dealt.

As was said by Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. at p. 815 (1881), the Prescription Act leaves untouched the right to claim title to an easement by any of the modes by which such a right might have been established before the Act was passed, except as affected by sec. 6, and permits the claim under the statute, except where the right is made absolute and indefeasible, to be defeated in any way by which it was then liable to be defeated, except that it cannot be defeated or destroyed by shewing only that the right was first enjoyed at some time prior to the prescribed statutory period.

See also *Aynsley v. Glover*, L. R. 10 Ch. 283 (1875).

The right given by the statute, it will also be observed, differs from the right which existed at common law, in

that the enjoyment is required to be for the prescribed period next before some action in which the right is brought in question, while at common law the enjoyment was not required to be for a period next before such an action, and it follows from this that when the right is claimed under the statute, however long the period of enjoyment may have been, it is still inchoate until the right is brought in question in some action; and that if the right be claimed, as it still may be, apart from the statute, and a sufficient enjoyment of it has been had to justify the presumption that it had a legal origin being made, a suspension of the right by reason of unity of possession would not affect it, and non-user not amounting to abandonment not destroy it.

Judgment.

Meredith,
C.J.

Some of the cases relied on by Mr. Shepley are to be explained, I think, as applying to rights so claimed.

So, too, I apprehend, if the right under the statute had become complete by reason of its having been established in some action in which it was brought in question, the same considerations would apply to it, and the same result would follow.

I am by no means satisfied that, but for the difficulty I shall afterwards refer to, the appellant might not, even though his claim under the statute cannot be sustained, support it by the application of "the doctrine of lost grant."

It was practically settled by *Dalton v. Angus*, 6 App. Cas. 740, that where twenty years' open and uninterrupted user is proved, a jury may and ought to presume the existence of a lost grant, if, as said by Mr. Justice Field, at p. 762, there be no evidence in denial, explanation, or modification of the actual enjoyment, and that this presumption cannot be displaced by merely shewing that no grant was in fact made, though it is rebutted if there be an incapacity to grant the easement, extending over the whole period in the course of which the right (if granted at all) must have been granted: *Gale on Easements*, 6th ed., p. 174.

An early instance of the application of this doctrine is

Judgment.
Meredith,
C.J.

to be found in the case of *Campbell v. Wilson*, 3 East 294 (1803), where the grant was presumed after an enjoyment of twenty-five years, which was, except for a period of a year or two, which happened eighteen or nineteen years before action, when there was a union of occupation of the plaintiff's and defendant's closes (in which respect the case is not unlike the present one), an adverse user. See also *Timmons v. Hewitt*, 22 L. R. Ir. 627 (1888); *Bass v. Gregory*, 25 Q. B. D. 481 (1890).

I doubt also whether, if it were not for the difficulty referred to as being in the way of the appellant, it would not be open to him to successfully contend that the respondent cannot set up that the user of the way during the period for which he occupied house No. 9, after he became the owner of house No. 13, was a user of his own soil. It appears to me that there is strong ground for contending that he is, by reason of his tenancy, estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant of them.

It is, however, I think, impossible for the appellant to succeed in his claim to the right of way, either under or apart from the statute, for a reason which does not appear to have been urged before the Master. The position of matters, I take it, after the death of the testator, was this. That part of lot No. 5 which lay to the east of the way claimed, and was bounded on the west by the west wall of house No. 9, and the fence which had formed the division fence between the two tenements during the testator's lifetime, must have constituted, as to the right of way claimed, the dominant tenement, and the residue of lot No. 5, the servient tenement. The interposition between the *locus* of the way and lot No. 4, of part of lot No. 5, which was devised to William, prevents the way being treated as a way to lot No. 4. The land over which the way had been previously enjoyed did not extend beyond the gate which formed the means of entrance to the land on which house

No. 9 was built, and, after passing through the gate, the passer through entered upon that land, not in the exercise of any right of way over it, but upon it as land in the exclusive occupation of the tenant of the premises, and while Frederick and his tenants were in possession of the part of lot No. 5 devised to William, though having no title to it, the way must for the like reason be treated only as a way to that part of the land. If this be so, there was unity of seizin of the alleged dominant and servient tenements in William, and of each in fee, and no easement could exist while that unity continued : Gale on Easements, 6th ed., p. 504, and cases there cited in note (*d*) ; and, therefore, the enjoyment of right began when, by the effect of the Statute of Limitations, William's title to the part of lot No. 5 occupied with house No. 9 became extinguished, which was less than twenty years ago.

Judgment.
Meredith,
C.J.

For these reasons, I think that the appellant's right to the easement claimed by him has not been established, and that the appeal should be dismissed with costs.

ROSE, J. :—

I agree that a right of way did not pass by implication, and that the division of the land by the devise created a unity of possession in William, as stated by the learned Chief Justice, and that on these grounds the appeal must fail.

It becomes, therefore, unnecessary to discuss the other questions raised.

MACMAHON, J. :—

I agree.

E.B.B.

[QUEEN'S BENCH DIVISION.]

THE BUILDING AND LOAN ASSOCIATION V. POAPS.

Statute of Limitations—Sale of Land—Trustee and Cestui que Trust—Possession by Cestui que Trust—Non-effective Right of Entry—Mortgage by Trustee—Registry Act—Priority.

The relationship arising out of an agreement for the sale of land on payment of the purchase money and the taking of possession by the purchaser is that of trustee and *cestui que trust*, and as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the possession of the *cestui que trust*.

The principle of the decision in *Warren v. Murray*, [1894] 2 Q. B. 648, applied.

A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that anyone other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the *cestui que trust* is entitled to set up the provision of the Registry Act, which is retrospective, and to plead it, if it is necessary to do so.

Bell v. Walker, 20 Gr. 558; *Grey v. Ball*, 23 Gr. 390, followed.

Statement.

THIS was an action by the plaintiffs for the recovery of "the commons" between lots 18 and 19, in the 8th concession of the township of Osnabruck, containing fifty acres, the plaintiffs claiming title under a mortgage to them for \$400, given by one Jacob J. Poaps, the patentee of the Crown.

On behalf of the defendants it was claimed that in October, 1859, an agreement was come to between Jacob and Alfred Poaps, that Alfred should allow Jacob to get from their father a deed of twenty-five acres, which the father had previously intended giving to Alfred, and that in exchange Jacob, who was entitled to the grant from the Crown of the land in question, should convey it to Alfred when the patent was obtained: that pursuant to this agreement, Alfred went into possession of the land in question, and with his family remained on it till his death in 1891.

The lot was patented to Jacob on 13th March, 1867, who (the defendants claimed) refused to convey to Alfred, but left him in possession under the agreement. Jacob mortgaged the lot to the London and Canadian Investment

Company in 1877, and this mortgage was paid by the plaintiffs when they took and registered their mortgage in September, 1881. Statement.

Evidence was given of possession by Alfred and his family, and of entries and acts of ownership by Jacob, it being claimed on behalf of Alfred that those acts were done without his knowledge or consent. It was proved that Jacob in October, 1885, had made a conveyance of forty-five acres of the lot to Jonas, a son of Alfred, in consideration of one dollar, subject to a mortgage for \$200. The plaintiff's mortgage for \$400, was the only mortgage on the lot.

The defendants, the widow and children of Alfred, also claimed title by possession, and also claimed that Jacob's title had been extinguished by operation of the Statute of Limitations prior to the mortgage by him to the plaintiffs.

The action was tried before MEREDITH, C. J., at the non-jury sittings at Cornwall, on the 10th September, 1895.

Allan Cassels, for the plaintiffs.

Leitch, Q. C., for the defendants.

At the close of the case, the learned Judge delivered the following judgment:

MEREDITH, C. J. :—

I think there is no other conclusion I can come to upon the facts than that the agreement, substantially as stated by Winters and by the widow,* is made out. I wholly discredit the evidence that Jacob has given. His account of the arrangement under which he got five acres in payment of a debt of \$200 which the father of Jonas owed him, is entirely consistent with the story of the other side, and wholly inexplicable upon any theory that he could

*The evidence of these witnesses was to the effect mentioned in the statement of the case.

Judgment.
Meredith,
C.J.

propound. Then the possession and improvements that have been made I think are circumstances that make in favour of the story told by Winters and the widow. I should hesitate a good deal, if the case depended simply upon Winter's evidence and that of the widow; and if any reasonable answer or explanation had been given by Jacob, I should have hesitated to give effect to the evidence of conversations taking place so many years ago, even although there had been the possession referred to. As I say, in the absence of any explanation of the act which Jacob Poaps admits, I must come to the conclusion, without doubt, that the agreement set up by the defendants, has been made out. Under that agreement forty-five acres would become the property of Alfred. Then I find there has been such exclusive possession by Alfred during the period of, say thirty-three years, down to the time of his death, and by his widow and children since that, of this land, as was sufficient to have given them a title by force of the Statute of Limitations. In the view I have taken as to the agreement, these acts of cutting and taking the wood off the place, which undoubtedly took place during various years, through Jacob and his servants, are immaterial. If Alfred were simply a tenant at will, holding under no agreement, not actually, as I have found him to be an owner of the land, then those entries by the true owner, would have been sufficient to prevent the statute running; but in the view I take of the agreement, I have come to the conclusion that is wholly immaterial.

The plaintiff is entitled to succeed as to the five acres.

So there will be judgment for the plaintiff for the five acres, and there will be judgment for the defendants declaring their rights in accordance with the opinion I have just delivered. I think the parties having failed in part and succeeded in part, there should be no costs.

The plaintiffs appealed to the Divisional Court of the Queen's Bench Division, and the appeal was argued on the 19th November, 1895, before ARMOUR, C. J., and FALCONBRIDGE, J.

Allan Cussels, for the plaintiffs.

Leitch, Q. C., for the defendant.

Argument.

March 16th, 1896. The judgment of the Court was delivered by

ARMOUR, C. J.—[Who, after setting out very fully the pleadings, the evidence and the judgment of Chief Justice Meredith, proceeded]:

I should have had great difficulty in coming to the conclusion arrived at by the learned Chief Justice, that the agreement, as stated by Winters and by the widow, was made out; and in coming to the conclusion, which he must have come to, before he could have found that Alfred Poaps was the equitable owner of the land, in the position of a purchaser in possession who had paid the whole of his purchase money, that the agreement was carried out by John Poaps in pursuance of it conveying the twenty-five acres of his land to Jacob J. Poaps.

No attempt was made on the part of the defendants to prove that John Poaps ever did convey any twenty-five acres of his land to Jacob J. Poaps in pursuance of this agreement, and Jacob J. Poaps denied that he ever did, and said that although John Poaps had conveyed to him two or three parcels of land, he had bought them from John Poaps and paid him for them.

I do not see any evidence upon which specific performance of this alleged agreement could be decreed against Jacob J. Poaps, nor any evidence from which the inference could reasonably be drawn that Alfred Poaps was the equitable owner of the land in the position of a purchaser who had paid the whole of his purchase money.

The facts that Alfred Poaps never asked Jacob J. Poaps for a deed of the land in question: that he allowed Jacob J. Poaps to cut timber and wood thereon: that he knew that Jacob J. Poaps had mortgaged it and raised no objection to his doing so: that he acquiesced in his son

Judgment. the defendant Jonas Poaps taking a deed of the land from Jacob J. Poaps, subject to an encumbrance, was all against the notion that he was himself the equitable owner of the land.

These facts, and all the other facts in the case, are, in my opinion, more consistent with the notion that Jacob J. Poaps was the absolute owner of the land, and that he was willing to permit his brother Alfred Poaps to occupy it, and subsequently to give it to him subject to the encumbrance, reserving five acres of it for himself.

The learned Chief Justice disbelieved Jacob J. Poaps because he was unable to give a satisfactory reason why he reserved these five acres, and his evidence in respect of it was certainly confused and unsatisfactory, but his interest would seem to be rather with the defendants than against them.

In my opinion, therefore, the possession of Alfred Poaps was that of a true tenancy at will, and not that of a tenancy at will arising out of the alleged agreement.

If his possession was that of a true tenant at will to Jacob J. Poaps, I agree with the learned Chief Justice's finding and opinion, that repeated entries were made by Jacob J. Poaps upon the land, and timber and wood cut thereon by him; and that such entries and acts of ownership, acquiesced in by Alfred Poaps, sufficed to prevent the extinguishment of the title of Jacob J. Poaps.

It was pretended by the defendants that they were not aware of these entries and acts of ownership by Jacob J. Poaps; but it is impossible to believe that Alfred Poaps living on the land, which was only fifty acres in extent, should not have been aware of these entries and acts of ownership, and, being repeated, the inference is that he acquiesced in them.

The proper inference, moreover, to be drawn from the taking of the deed of part of the land from Jacob J. Poaps, subject to the encumbrance is, that the circumstances under which Alfred Poaps had theretofore occupied the land, were such as did not serve to extinguish the title of Jacob J. Poaps.

If, however, as the learned Chief Justice held, the pos- Judgment.
 session of Alfred Poaps, was that of equitable owner of Armour, C.J.
 the land, the relationship of Jacob J. Poaps and Alfred
 Poaps became that of trustee and *cestui que trust*, and
 Alfred Poaps being in the position of a purchaser who had
 paid the whole of his purchase money, the case is brought
 within the principle of the case of *Warren v. Murray*,
 [1894] 2 Q. B. 648, and the Statute of Limitations does
 not apply to it, for Jacob J. Poaps never had any right of
 entry, that is, any effective right of entry, for if he had
 brought an action to recover the land, he would at once
 have been perpetually enjoined by a court of equity from
 proceeding with it.

In that case, Lord Esher, M. R., said, at p. 653, after dis-
 cussing the question whether the trustees had any right of
 entry, and holding that they had none, because they had
 no effective right of entry, "my judgment is, that where
 by the law, taking it as a whole including equity, the
 person, against whom the Statute of Limitations is vouched,
 could not recover the land in question, the statute does
 not apply."

Kay, L. J., agreed in this, and held also that the case
 was excluded from the operation of what is sub-section 7
 of section 5 of the Real Property Limitation Act, R. S. O.
 ch. 111, for sub-section 8 provides that "no mortgagor or
cestui que trust shall be deemed to be a tenant at will within
 the meaning of the next preceding sub-section to his mort-
 gagee or trustee;" in his view sub-section 8 including a
cestui que trust under an implied trust.

Had it not been for this decision, I should have thought
 that the right to make an entry within the meaning of the
 Real Property Limitation Act, meant the right to make an
 entry at common law, and that the words *cestui que trust*
 in section 5, sub-section 8, meant a *cestui que trust* under
 an express trust.

There was no evidence to shew that the plaintiffs at the
 time they took their mortgage, had any notice that any one
 other than the mortgagor was in occupation of the land, or

Judgment. any notice actual or constructive of the equitable right of
Armour, C.J. Alfred Poaps: their mortgage was duly registered; and the equitable interest of Alfred Poaps must, therefore, be deemed to be invalid as against it under section 83 of the Registry Act.

It was contended that this provision was not retrospective, and did not, therefore, apply to the equitable interest in this case, but we must follow the latest decisions on the point and hold that it is: *Bell v. Walker*, 20 Gr. 558; *Grey v. Ball*, 23 Gr. 390.

It was also contended that the plaintiffs could not avail themselves of this provision of the Registry Act, as they had not pleaded it.

It seems doubtful whether the plaintiffs are required to plead this provision of the Registry Act in order to take advantage of it: Cons. Rule 402; but, if required, they can now amend their pleadings by setting it up: *Williams v. Leonard*, 16 P. R. 544.

There will, therefore, be judgment for the plaintiffs for the whole of the land with full costs of suit.

G. F. H.

FLEMING V. LONDON AND LANCASHIRE LIFE ASSURANCE
COMPANY.

*Life Insurance—Premium—Payment—Promissory Note of Third Person—
Discount of Note of Insured.*

There is nothing to prevent an insurance company from accepting the promissory note of a third person in satisfaction and discharge of a premium; and a condition of a policy providing that if a note be taken for the first premium and shall not be paid when due, the policy shall become null and void, is not applicable to a note so taken, but to one taken for and on account of the premium.

And *semble*, that where the agent of the insurance company discounted notes given by the insured for the premium, and retained the proceeds, sending his (the agent's) own note to the company for the amount of the premium, less his commission, the transaction amounted, when the proceeds of the discount were received, to a payment in cash of the premium.

THIS was an action brought to recover the amount of Statement.
two policies of insurance of the defendants on the life of James Fleming, dated the 4th December, 1894, for \$5,000 each. The facts are stated in the judgment.

The action was tried before MEREDITH, C. J., without a jury, at Toronto, on the 27th January, 1896.

Osler, Q. C., and J. R. Roaf, for the plaintiff.

Wallace Nesbitt and R. A. Dickson, for the defendants.

March 11, 1896. MEREDITH, C. J.:—

The applications for the insurance were made by Fleming on the 19th November, 1894, to W. H. White, who was the defendants' general agent for the district of Toronto and vicinity, and the premium payable in respect of each of them was \$105.80, 55 per cent. of which the agent was, under the terms of his agreement with the defendants of the 2nd August, 1892, entitled to as his commission for obtaining the risks.

The applications were forwarded in due course by the general agent to the head office of the defendants at Montreal, and were considered and accepted on the 4th December, 1894; and on the following day, interim acceptance

Judgment.
Meredith,
C.J.

receipts on the defendants' usual form were forwarded to White, accompanied by a letter of the same date, in which he was informed that his account had been debited with the amount of them, and of another receipt relating to another insurance which was sent to him at the same time.

By the terms of the agreement between the defendants and White, he was not "under any circumstance" to "collect or receive payment of any premium without giving the head office receipt or policy therefor," and it was provided that all premiums should be paid in cash or notes approved by the defendants, and that the agent should not receive payment for premiums or renewals thereof in any other manner.

White was furnished by the defendants with forms of receipts which from their terms would appear to have been intended to be given to applicants for insurance who desired to pay their first premium by note or partly by note and partly in cash.

The following is one of these forms put in at the trial:—

No. 4420. (In Duplicate.) Note payable.....

LONDON AND LANCASHIRE LIFE ASSURANCE CO.

Agent's Interim Receipt.

Received from, Esq., of, his promissory note for dollars (on which the sum of dollars has been credited), being for the premium for an assurance of \$..... on the life of, provided the application be accepted by the company, and if accepted, I agree to deliver the official acceptance receipt from the head office of the company in Montreal; or should the said application be declined, I undertake to return to, Esq., or to his order, the said promissory note. It is hereby understood and agreed that if the note be not paid at maturity, the policy or official receipt shall be null and void, but nevertheless the note shall be paid in full.

..... Agent.

Date

Place—Toronto.

White had given to Fleming two receipts, dated the 19th November, 1894, for promissory notes for the amounts of the premiums, payable by the latter; the receipts were upon the form I have just referred to, except that all the words in it commencing with the words "it is hereby understood," down to the end of the receipt, were stricken out, and the words "within fifteen days" interlined.

Judgment.
Meredith,
C.J.

One of these promissory notes, made by Fleming, the insured, was dated the 19th November, 1894, and was payable to the order of White six months after date; and the other, made by Robert Fleming, a brother of the insured, was dated the 10th December, 1894, and was payable in like manner three months after date.

White did not communicate to the defendants the fact that he had taken these promissory notes, or inform them how he had arranged with Fleming for payment of the premiums, but on the 31st December, 1894, he telegraphed the defendants as follows:—

"Mailed my note \$135.16 for premiums Fleming, McGlade, Thompson;" and on the same day he wrote the defendants as follows: "I omitted to enclose settlement of new premiums; hence I wired you to-day as follows: 'Mailed my note \$135.16 for premiums Fleming, McGlade, Thompson,' which I enclose herein."

The amount mentioned in the telegram and letter was made up of the premiums on the two insurances in question and those of McGlade and Thompson, after deducting the agent's commission of 55 per cent.

On the 3rd January, 1895, the manager at the head office wrote to White acknowledging the receipt of his letter of the 31st December, in these terms: "I am in receipt of your letter of 31st ult. enclosing note at three months for \$135.16, which we will hold as requested."

According to the evidence of the manager, the policies in question were included in the defendants' return to the insurance department, which must, therefore, have represented the promissory note of White as an asset of the defendants, and the policies as "outstanding policies in force."

Judgment. At this time, according also to the evidence of the manager, he assumed that White had received the premiums in cash.
Meredith,
C.J.

It did not appear in evidence when the interim acceptance receipts were handed by White to Fleming, but they were produced by the plaintiff and are countersigned by White—his countersigning being, according to a note at the foot of the receipts, necessary to their validity.

White, after receiving the promissory notes, but at what time was not disclosed in evidence, discounted them with Burk & Graham, a firm of private bankers in Toronto, receiving the amounts of them, less the discount, and indorsing them to Burk & Graham.

It is important at this point to note that at the date when White forwarded his own promissory note to the defendants, he had possessed himself, by means of the discount of Fleming's promissory notes, and had in hand, far more money than would have been sufficient to pay to the defendants that part of the premiums to which they were entitled.

On the 22nd January, 1895, White wrote the defendants asking them to forward, among others, the policies in question, and they were accordingly forwarded to him on the following day,* with a letter which informed him that he had been debited with the premiums in respect of them.

The promissory note of the 10th December, 1894, was renewed in full on the 21st March, 1895, by a new promissory note at two months; and on the 5th June, 1895, the other promissory note of the 19th November was renewed for \$100.80,† \$5 being paid in cash to White, who gave a receipt for the note and cash as having been received "to retire James Fleming's note for \$105.80 due May 22nd, 1894;" but on this latter note being taken to Burk & Graham, they refused to renew, and retained the note of the 19th November, 1894, in their own hands overdue.

* The policies were then given to the insured.

† This renewal was for three months.

The promissory note of the 21st March, 1895, was not paid at maturity, and it with the note of the 19th November, 1894, remained over due and unpaid in Burk & Graham's hands until some time in July, when, in order that the defendants might be in a position to say that they held the notes as past due notes, they were taken up by White with moneys furnished to him by the defendants, to whom they were handed over.

Judgment.
Meredith,
C.J.

Fleming was at this time dead, his death having taken place on the previous 15th June.

Upon this state of facts, the defendants contend that the policies were never binding on them at all, because, as they say, White received neither the cash nor promissory notes approved of by them for the premiums; and that, even if the promissory notes taken by him or White's own note are to be treated as notes given for the insurance premiums, or even if the latter was accepted in satisfaction and discharge of the premiums, the conditions indorsed on the policies prevent the plaintiff recovering—the policies having, as they contend, become void in consequence of the notes not having been paid at maturity, and they invoke in support of this contention condition 1, which provides that policies shall not be in force until the first premium is paid; and condition 10, which is as follows: "If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or obligation be not paid when due, the policy or assurance becomes null and void at and from default; but such voidance of the policy or assurance shall not relieve the maker thereof from payment of the note or obligation, and the premium shall be considered as earned, and shall be recoverable by the company. The policy or assurance, however, may be revived and reinstated, at the discretion of the directors, on condition of payment of the premium and interest, and evidence of continued good health. Should any note or other obligation for premium be current at death, or other event upon which the sum assured becomes

Judgment. payable, the amount of the note or obligation shall be deducted from the claim."*
Meredith,
C.J.

And they further contend that the renewal of the promissory note of the 19th November, 1894, after it was overdue, was an unauthorized act of the agent and not binding on them; and that, after default, the directors, and they only, could revive or reinstate the policy.

It was urged on behalf of the plaintiff that the effect of the transaction between White and Fleming was that there was a payment in cash of the premiums, and that, even if that be not so, the defendants accepted White's promissory note for \$135.16 in payment of the portion of the premiums to which they were entitled, and that the condition relied on has no application to a case where the promissory note of a third person is accepted in satisfaction of the premium.

The case is by no means free from difficulty, but I have, after much consideration, come to the conclusion that the plaintiff is entitled to succeed.

There is nothing, so far as I can see, to prevent a company, such as the defendant company is, accepting in satisfaction and discharge of a first or any other premium, the note of a third person, if the company chooses to do so, and it seems to me that to a promissory note so taken, condition 10 can have no application. It would be indeed an anomaly if, after payment by such a promissory note, and the premium being thereby satisfied and discharged, the default of the maker of the note in paying it should void the policy and render the insured also liable to pay the premiums in satisfaction of which it had been accepted. The condition is, in my opinion, not applicable to such a case, but to cases where the promissory note is taken not in satisfaction and discharge of the premium, but for and on account of it, where it would operate only as a conditional payment, to be absolute if and when the note was paid at maturity.

* The evidence was that the note made by White was not paid, and was destroyed after the death of the insured.

If this be the correct view as to the law, what is the proper finding of fact as to the way in which White's promissory note was received by the defendants? It is, I think, that the note was taken in satisfaction and discharge of the premiums.

Judgment.
Meredith,
C.J.

As I have pointed out, White had the proceeds of the promissory notes given by the Flemings in his hands, though he was liable to Burk & Graham as indorser on them; the notes were not taken by him on the defendants' account, but were taken and dealt with as a transaction between him and the insured, and for the purpose, as I think the fair inference is, of enabling him to pay to the defendants in cash the share of the premiums to which they were entitled, and to give to him the present use of his own share of them; and White, I think, when he sent his letter and telegram of the 31st December, 1894, to the defendants, intended that they should take, and they, in receiving his promissory note, intended to take and took, it in satisfaction and discharge of the premiums due to them in respect of the policies to which they had reference. In reaching this conclusion, I rely on the language used in the correspondence, read in connection with what had taken place and the manner in which the defendants afterwards treated and dealt with the policies, rather than the recollection of White and Brown (the manager) as to what the true character of the transaction was.

The provisions of the bond given by White and his sureties to the defendants in 1891 are not without significance. In addition to the provisions contained in the printed form used, which I take to be the ordinary ones, I find a special provision in these words:—

"It is understood and agreed that this bond will cover payment of any and all notes made by W. H. White that the company may accept from the said W. H. White for premiums under policies effected by him, as well and effectually as if no such note or notes were taken."

It may well be, I think, that the arrangement made between White and Brown (the manager) to which the

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latter referred in his evidence was that to which this term of the bond refers, and it was probably in pursuance of it that White assumed the right to send, as he did, his own promissory note in settlement of the premiums.

I am inclined to think also that the transaction between White and the insured amounted, when the proceeds of the promissory notes which he received from him came into White's hands, to a payment in cash of the premiums and that the plaintiff's right to recover may be supported on that ground also.

The defendants' counsel cited the case of *McCormick v. Temperance and General Life Ass. Co. of N. A.*,* which they contended was a conclusive authority in favour of the defendants, but I am unable to agree to that view, and the language of the learned Chief Justice Armour seems to me to indicate that, in his opinion, on a state of facts similar to that which exists in this case, a conclusion ought to be come to different from that which was arrived at in that case. He says: "The liability of the agent to pay the defendants the amount of the note of the insured could not be substituted for the liability of the insured to pay it by the act of the agent, without the consent of the defendants."

Upon the whole, the plaintiff is, in my opinion, entitled to judgment for the full amount of the policies, with interest from the date of the receipt by the defendants of the proof of death, together with her costs of suit.

E. B. B.

* An unreported decision of the Queen's Bench Divisional Court, 23rd December, 1895. The case has been carried to the Court of Appeal.

ELLIOTT V. MORRIS ET AL.

Will—Widow—Legacy—Dower—Election—Estoppel.

A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity, provision being made for the early conversion into money and distribution of the estate :—

Held, that the widow was not put to her election, but was entitled both to her legacy and to dower.

The will further provided that the widow for her legacy might have the first selection of such securities or real estate as she might think desirable. Without making any claim to dower, she joined with her co-executors in sales and conveyances of parts of the real estate, and selected the remainder of it in part satisfaction of her legacy, and, although not transferred to her, subsequently dealt with such remainder as her own. It was not until after the sales and selection referred to that her right to dower was in any way considered, when she immediately claimed it :—

Held, that, under these circumstances, the residuary legatees not having been prejudiced by her dealings with the lands selected by her, she was not estopped from claiming dower ; but was entitled to treat the executors as having received for her use so much of the purchase money of the lands sold as was equal to the value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the Court of the lands free of her dower, and so much of the sum at which the lands selected by her were valued at as was equal to the value of her dower in those lands, ascertained in the same way : *Bingham v. Bingham*, 1 Ves. Sen. 126, applied.

THIS was an action brought by Caroline Elliott, widow Statement. of George Elliott, against the executors of his will, and the Guelph General Hospital, residuary legatees thereunder, for the purpose of having the true construction of the will declared.

George Elliott died on the 9th May, 1893. His will bore date the 23rd January, 1892, and, after appointing executors, etc., provided as follows :—

"5. I give to my wife Caroline Elliott, for her own use absolutely, \$25,000, for which sum she may have the first selection of such securities or real estate as she may think desirable * * but, until such selection and transfer is made to her, she shall be paid from the income of the estate a sum amounting to six per cent. per annum on the sum mentioned in the above legacy, in quarterly payments, from the date of my death." * *

Statement. "22. I will and bequeath to my wife Caroline Elliott all my furniture, china, crockery, books, silver and silverware, pictures, and household goods of every kind." * *

"30. My desire is that my executors shall, in their discretion, convert my real estate into money * * at as early a date as they may deem prudent, converting my personal property and securities for moneys into cash as may be required, so as to distribute my estate as early as convenient."

There was no other mention of the plaintiff in the will (except in appointing her an executrix), and there was no mention of dower.

Besides a specific legacy of \$5,000 to the defendants the Guelph General Hospital (a body corporate and politic), the testator directed that the residue of his estate, after satisfying numerous legacies to individuals and charities, should be devoted to the erection and furnishing of a building adjoining the Guelph General Hospital building, to be managed by six of the elected directors of the General Hospital; and, in the event of the directors refusing to accept this trust, that the residuary estate should be divided among certain charities.

The defendants the Guelph General Hospital accepted the trust.

At the time of his death the testator was possessed of real estate in the city of Guelph of large value, of real estate in the city of Cincinnati, in the State of Ohio, to the value of \$4,900, and of personal property to the value of about \$58,000.

The plaintiff claimed dower in the testator's real estate, in addition to the legacy of \$25,000.

The defendants the Guelph General Hospital by their statement of defence submitted that the plaintiff had joined with her co-executors in sales and conveyances of parts of the real estate, and had selected real estate and securities to the value of \$25,000, under the 5th clause of the will, and had entered into possession thereof, without making any claim to dower, and had thereby elected

against and was estopped from claiming dower in the estate of the deceased. Statement.

The plaintiff in reply offered to have the selection made by her annulled.

The action was tried before MEREDITH, C.J., at Toronto on the 6th March, 1896.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the plaintiff.

A. H. Macdonald, Q.C., for the defendants the executors.

Moss, Q.C., and *W. A. McLean*, for the defendants the Guelph General Hospital.

March 11, 1896. MEREDITH, C.J.:—

Whether the rule of construction to be applied to the will be that laid down by Vice-Chancellor Kindersley in *Gibson v. Gibson*, 1 Drew. 42, and *Parker v. Sowerby*, *ib.* 488, or that which has the authority of Lord Cranworth in the latter of these cases when in appeal, 4 DeG. M. & G. at p. 326, to support it, the contention of the defendants the Guelph General Hospital that the plaintiff is put to her election between the provision made for her by the will in question in this case and her dower cannot, in my opinion, be sustained.

The will provides for the payment of a large number of pecuniary legacies, including the legacy of \$25,000 to the plaintiff, and, except as to the household property, which is bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, is given to the defendants the Guelph General Hospital.

There is nothing thus far in the will upon which an argument can be founded that the intention is manifested either that the widow is not to have her dower as well as the legacies given to her by the will, or to so dispose of the estate that the claim to dower would be inconsistent with that disposition.

It was argued that the provision which the testator has made for the early conversion into money and distribution

Judgment.
Meredith,
C.J.

of his estate indicates such an intention, because, as was urged, the claim to dower would prevent that being accomplished until the death of the plaintiff; but I do not see the force of that contention, for a sale of the land could be effected subject to the dower, or, by arrangement with the plaintiff, free from her dower, and in either case the sale could be proceeded with so as not to delay the winding-up of the estate.

The only other ground urged against the plaintiff's claim was that giving effect to it would very much lessen the benefits which the residuary legatees will receive under the will, and that, it was urged, would be contrary to the intention of the testator; but no case was referred to which justifies the rejection of the claim on that ground, nor on principle do I see how it can be justified, though, no doubt in cases where the widow's taking the dower as well as the gifts made to her by, would defeat some of the provisions of, the will, that has been held to be an element proper to be considered in determining whether the widow is put to her election.

In this case, however, there is no fixed sum given by the will to the hospital which would be lessened by the widow's claiming both the dower and the legacy, but the residue—whatever it may be—of the estate after paying the debts and legacies.

The plaintiff is not, therefore, in my opinion, put to her election.

It was further contended that the fact that the plaintiff had joined with her co-executors in sales and conveyances of part of the real estate, and had, in accordance with the provisions of the will, selected the remainder of it (I do not include the land in Cincinnati), at a valuation of \$19,000, in part satisfaction of her legacy, without making any claim to dower, and her subsequently dealing with the land selected by her as her own, and the alteration of the buildings and letting of the property for terms of years, estopped her from now claiming dower.

This contention, in my opinion, also fails. It is clear

that the plaintiff did not intend to give up, for the benefit of the estate, nor did the defendants the executors expect that she was giving up, her dower in the lands; in truth, the question of dower was not considered by any of the parties, but all of them seem to have proceeded, without inquiry into the matter, upon the assumption that the plaintiff had no claim except for that which the will gave her, and it was not until August or September, 1893, after these transactions (I mean the sales and selection) had taken place, that she became aware that she was entitled to dower as well as the legacy, and she immediately upon making that discovery communicated with her co-executors, asserting her right to it, and from that time on down to the commencement of this action, the subject appears to have been one of discussion and attempted compromise between her solicitors and the solicitors for the executors. Under these circumstances, and having regard to the fact that the transfer to the plaintiff of the lands selected by her has not been completed by the conveyance of them to her (that being left in abeyance from the time when her claim to dower was first asserted), and the fact that the residuary legatees have not been prejudiced by her dealings with the lands selected by her (her arrangements with the tenants being clearly beneficial to the owner, whoever he may be), it would be manifestly unjust that the plaintiff should, in consequence of these transactions, be deprived of her right to dower.

The case is, I think, fairly within the principle upon which *Bingham v. Bingham*, 1 Ves. Sen. 126, was decided, and the plaintiff is entitled, in my opinion, to treat the executors as having received for her use so much of the purchase money of the lands which have been sold as is equal to the value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the Court of the lands free of her dower, and so much of the \$19,000 at which the lands selected by her were valued, as is equal to the value of her dower in those lands, ascertained in the same way.

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Judgment.
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The plaintiff expressed her willingness to consent to the selection made by her being annulled. The defendants the executors may, therefore, if they so choose, have that done, and in that case the plaintiff will be chargeable with, and there must be an account taken of, the rents and profits received by her, and she will be entitled to interest on the \$19,000 and to make a new selection from the assets of securities sufficient to make up the balance coming to her on that basis. The defendants the executors must elect within a month.

If a reference be necessary, it will be to the local Master at Guelph.

The plaintiff will receive interest on the moneys to which I have found her to be entitled from the commencement of the action.

The defendants the executors are entitled to their costs as between solicitor and client, to be paid out of the residuary estate, and there will be no costs to the other parties.

Judgment will be entered in accordance with the opinion I have expressed.

E. B. B.

TORONTO GENERAL TRUSTS COMPANY V. IRWIN ET AL.

Will—Construction—Devise—Incumbrances—Exoneration—Widow—Dower—Election—Remainder—Acceleration.

By paragraph 3 of his will, made in 1886, the testator, who died in 1895, devised house No. 35, until 1st January, 1890, to his wife, and from and after that to his brother, "his heirs and assigns forever, free from all incumbrances." This property together with house No. 45, which, by paragraph 6, he devised, with other lands, to his wife for life, and after her decease to his brother, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for \$1,200, made by the testator, which was subsequently discharged and replaced by a mortgage for \$1,300 on the same lands, which was that subsisting at the date of the death. By paragraph 4 the testator bequeathed to his wife certain leasehold premises held by him at the date of his will. The term, however, expired in his lifetime, and nothing passed to his wife under this paragraph. By paragraph 5 the testator directed his wife to pay off the mortgage for \$1,200, and any other incumbrances upon the property devised by paragraph 3, and declared that the bequests made to the wife by paragraphs 3 and 4 were made to her for that purpose:—

Held, that the effect of the will was to exonerate house No. 35, to the extent of the interest in it devised to the brother, from the payment of the proportionate part of the mortgage, and to cast the burden of the payment of it upon the residuary estate, leaving the other house to bear its proportionate share of the mortgage.

2. That the devisee of house No. 35 was not entitled to have the dower of the widow in it discharged out of the residuary estate, she having elected to take her dower instead of the provision made for her by the will.
3. Paragraph 7 provided, in the event of the brother dying before the wife, for a sale of what the will described as "all my said property," and directed that the proceeds of the sale should be invested and the interest of the investment paid to certain persons for their lives, and for the division of the corpus, after the death of the survivor, among certain persons named:—

Held, that the provisions of paragraph 7 applied only to the devise contained in paragraph 6, and not to that in paragraph 3.

4. That the effect of the disclaimer by the widow of the provision made for her by the will was to accelerate the brother's remainder and make it an estate in possession.

AN action for the construction of the will of William Irwin, deceased, dated 4th October, 1886, and for the administration of his estate. The facts appear in the judgment. Statement.

The action was heard before MEREDITH, C. J., in Court, upon motion for judgment on the pleadings, on the 26th March, 1896.

T. W. Howard, for the plaintiffs.

Argument.

William Davidson, for the infant defendants.

George Lindsey, for the defendant Richard Irwin.

T. H. Bull, for the defendants Martha Stewart and Mary Jane Glassie.

Skeans, for the defendant Martha Irwin.

April 1, 1896. MEREDITH, C. J. :—

The testator died on the 26th September, 1895.

By paragraph 3 of his will he devised to his widow house No. 35, east of Broadview avenue, Toronto, with some land in rear of it, until January, 1890, and from and after that date he devised the same property to his brother, the defendant Richard Irwin, "his heirs and assigns forever, free from all incumbrances."

This property, together with house No. 45 in the same street, which by paragraph 6 he devised with other lands to his wife for life, and after her decease to the defendant Richard Irwin, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for \$1,200, made by the testator, which was subsequently discharged and replaced by a mortgage for \$1,300 on the same lands, which was still subsisting at the date of his death.

By paragraph 4 the testator bequeathed to his wife certain leasehold premises held by him at the date of his will; the term, however, expired in his lifetime, and nothing passed to the wife under this paragraph.

By paragraph 5 the testator directed his wife to pay off the mortgage for \$1,200, and any other incumbrances upon the property devised by paragraph 3, and declared that the bequests made by paragraphs 3 and 4 of the will to the wife were made to her for that purpose.

The first question to be determined is as to the liability to pay off the existing mortgage for \$1,300; the defendant Richard Irwin contending that it must be paid out of the assets primarily liable for the payment of debts; and the defendants Martha Stewart and Mary Jane Glassie and

the guardian of the infant defendants insisting that there is no exoneration of house No. 35, and that, if it be exonerated, the whole burden of the mortgage must be borne by the devisees of house No. 45.

Judgment.
Meredith,
C.J.

The effect of the will is, I think, to exonerate house No. 35, to the extent of the interest in it devised to the defendant Richard Irwin, from the payment of the mortgage, and to cast the burden of the payment of it on the residuary estate.

The intention to exonerate house No. 35 is, I think, plainly evidenced; the devise to the defendant Richard Irwin in paragraph 3 is declared to be of the property which is the subject of it free from all incumbrances; and by paragraphs 4 and 5 a fund is provided as the primary one for the payment of the mortgage.

It was argued that the exoneration was only so far as the bequest contained in paragraph 4 should operate for that purpose, and that that fund having failed, there was no exoneration.

No doubt, had the evidence of the intention to exonerate been confined to the provision made by paragraph 4 for the payment of the mortgage, there would have been strong ground to support this contention, and authority is not wanting to justify it; but upon this will I think it reasonably clear that the words of paragraph 3 indicate an intention to exonerate absolutely the interest of the defendant Richard Irwin in house No. 35; and that the fund intended to be provided for the payment of the mortgage by paragraph 4, was so provided in order to relieve the assets primarily liable of the burden which otherwise would have fallen upon them; and that the only effect of the failure of the fund is to leave those assets in the same position as they would have been in had paragraphs 4 and 5 not been contained in the will.

The contention that house No. 45 should bear the whole burden of the mortgage is also, I think, untenable.

Before the Act R. S. O. ch. 109, sec. 37, unless a contrary intention was shewn by the will, the devisee of lands

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incumbered by a mortgage made by the testator was entitled to have the mortgage debt paid out of the first four classes of property in the administration of assets; and the effect of the Act was to reverse this position, and to make the devisee take *cum onere*, unless a contrary intention appeared; and by the same section provision is made that "the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof."

If the will had contained no evidence of a contrary intention, houses 35 and 45 would, as between the respective devisees of them, have borne the mortgage debt, each bearing according to its value a proportionate part of the debt. The effect of the exoneration of house 35 is to relieve it from the proportionate part of the debt which it would otherwise have borne; but I see no reason why that should result in casting the whole upon house 45: full effect is given to the section by leaving that house to bear its proportionate part of the mortgage debt, and that part of the testator's estate which has become the primary fund for payment of the part of it which house No. 35 would, but for the contrary intention shewn, have borne, to pay that portion of the debt.

The next question to be considered is the contention that the devisee of house No. 35 is entitled to have that property discharged of the dower of the widow of the testator, she having elected to take her dower instead of the provision made for her by the will. This contention is, I think, untenable. If the dower of the widow be an incumbrance within the meaning of paragraph 3, the only effect of the provision as to the defendant Richard Irwin taking free from incumbrances would be, I think, to prevent the widow claiming the dower, if she decided to accept the provision made for her by the will, but not to cast upon the residue the burden of discharging house No.

35 from the dower ; and so construing the will gives, in my opinion, full effect to the intention of the testator, while to adopt the construction contended for would be to impose upon the other objects of the testator's bounty a burden which there is nothing to shew that he intended they should bear.

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C.J.

The next question which has arisen is as to the meaning of paragraph 7. It provides, if the defendant Richard Irwin should die before the testator's wife, for a sale of what the will describes as "all my said property," and directs that the proceeds of the sale be invested, and the interest of the investments paid in certain proportions to the defendants Martha Stewart and Mary Jane Glassie for their lives, and the life of the survivor, and for the division of the corpus after the death of the survivor as follows: \$500 each to the sons of Terence Farr, and the balance equally between the children of the life-tenants and the children of Richard, if he should marry and "leave issue by such marriage."

By paragraph 6, to which I have already referred, certain lands are devised to the wife for life, and after her death to Richard, his heirs and assigns forever, subject to the payment of \$500 to each of Terence Farr's sons William and Frederick, and \$500 each to Martha Stewart and Mary Jane Glassie, the latter to be paid in two and four years respectively, "after my said brother acquires the property."

It is argued by those entitled under the provisions of paragraph 7, that the provisions of that paragraph apply as well to the lands devised to Richard by paragraph 3, as to those which are devised to him by paragraph 6, and it is contended by Richard that they apply only to the subject of the devise contained in paragraph 6.

The contention of the defendant Richard Irwin is, in my opinion, the one which should prevail. The word "said" grammatically applies to the last antecedent, and should therefore be confined to the property mentioned in paragraph 6 ; and, looking at the whole scope of the will, and

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C. J.

especially the destination of the subject of the devise mentioned in paragraphs 6 and 7, that was, I think, manifestly the intention of the testator. By paragraph 6 he had made provision for the same persons whom he provides for by paragraph 7, and apparently, though erroneously, thought that if Richard died before his wife, the property which he gave to him by paragraph 6 would be undisposed of, and he, therefore, makes provision for the same objects whom he had provided for by paragraph 6, and for the children of Richard, should he marry and leave issue; then again, if a wider meaning be given to the word "said," and it be taken to refer to all the property which the testator had by the preceding provisions of the will disposed of, it would include the subject of the bequest and devise to the wife contained in paragraphs 2, 3, and 4, which there is no reason for thinking the testator intended to defeat: see *Crawford v. Broddy*, 22 A. R. 307.

I am, therefore, of opinion that the property dealt with by paragraph 7 is that devised by paragraph 6, and that only.

The last question is as to the effect of the disclaimer by the widow of the provision made for her by the will, including the devise for life of the lands devised in remainder to the defendant Richard Irwin, his contention being that the effect of the disclaimer is to accelerate his remainder, and to make it an estate in possession, while the other defendants contend that the effect is not to accelerate, but that the lands pass, as undisposed of for the life of the wife, to the next of kin of the testator, the residuary devise having failed to take effect by the wife's disclaimer.

It has been held that where there is a devise to one for life with remainder in fee, the remainder is accelerated where the tenant for life is incapable of taking or is not in *rerum naturâ*, and where the life estate is revoked, or determined by a forfeiture clause: Theobald on Wills, 4th ed., p. 647, and cases there cited; and *Ajudhia v. Mussamuet*, L. R. 11 Ind. Ap. 1.

These cases establish that, *primâ facie*, words by which

an estate is devised after the decease of one to whom a life estate is given, are to be understood as denoting the order of succession of the limitations; and that the estate in remainder becomes one in possession so soon as the prior estate which is interposed is out of the way either by its being determined by death or otherwise.

Judgment.
Meredith,
C.J.

I see no reason why the rule should not be applied, where, as in this case, the estate for life has come to an end by the disclaimer of the wife. The testator's intention was that the possession of the estate by his brother should be delayed only for the purpose of enabling his wife to enjoy the prior estate which he designed that she should have, and, the reason for the postponement being at an end, the postponement should end also.

As early as 36 Eliz., Mr. Justice Gawdy said, in *Fuller v. Fuller*, Cro. Eliz. 422: "To the second point there is no doubt, but that he in remainder shall have it presently; for the devise being void to the first, it is as if it never had been made; so it is if the first devisee refuse, he in the remainder shall have it presently;" citing for this a case in Plowden in the reign of Henry VI. (37 Hen. VI., Plow. 414.) The case to which these words refer was one of a devise in tail with divers remainders over, and the first devisee had died in the lifetime of the testator.

There being nothing in the will to exclude the application of the rule, I must, therefore, hold that the effect of the widow's disclaimer is to accelerate the estate devised to the defendant Richard Irwin.

I make no order for the administration of the estate. I see no reason why it should be administered in Court.

There will be judgment declaring the true construction of the will in accordance with the opinion I have expressed, and the costs of all parties will be paid out of the estate, those of the plaintiffs as between solicitor and client.

E. B. B.

THE CREDIT FONCIER FRANCO-CANADIAN V. LAWRIE

Covenant—Unexecuted Deed—Acceptance of Benefit under Deed—Action.

An action of covenant cannot be maintained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay certain mortgages existing upon the premises but which has not been executed by the grantee, although she has accepted the benefit of the deed.

Statement. THIS was an action brought against Daniel McLean upon the covenants contained in two mortgages made to William Gooderham on July 3rd, 1888, and April 1st, 1889, and which had been duly assigned to the plaintiffs, and against Annie Lawrie upon an alleged covenant in a conveyance dated January 8th, 1894, by Daniel McLean to her of the equity of redemption in the lands comprised in the mortgages. This conveyance contained a covenant on the part of Annie Lawrie to pay the amount due on the mortgages, but it had never been executed by her.

The action was tried at Toronto non-jury sittings, on March 2nd, 1896, before MEREDITH, J.

R. McKay, for the plaintiff.

No one appeared for the defendants.

A written argument was put in on behalf of the plaintiff in which it was submitted that by the acceptance of her deed, the defendant, Annie Lawrie, became bound by and liable to pay under the covenant therein contained, and that an action of covenant would lie at law in such a case: *Brett v. Cumberland*, Cro. Jac. 521; *Ewre v. Strickland*, Cro. Jac. 240; Coke on Litt., 231a; Comyn's Dig. Tit. Fait. B. 1; *Burnett v. Lynch*, 5 B. & C. 589, 596; *Moule v. Garrett*, L. R. 5 Exch., at p. 137 *et seq.* If not liable on covenant, she, it was contended, was liable as in contract by virtue of the acceptance of the deed containing the provision which it did, the taking possession of the estate and acting thereunder: *Canavan*

v. *Meek*, 2 O. R. 636; *Crawford v. Edwards*, 33 Mich. Judgment. 354. *Witham v. Vane*, 44 L. T. 718, is distinguish- Meredith, J. able upon the special circumstances there existing, the covenant there not touching the land demised, or being connected with the consideration. At any rate Lawrie must be held liable in equity, not merely on the implied obligation arising from the purchase and taking possession of the land, subject to the incumbrance, but on the ground of the acceptance of the deed and taking the benefit under it: *Wilson v. Leonard*, 3 Beav. 373. The deed expressly recited that the property was conveyed subject to a mortgage, and the covenant to pay off the mortgage was part of the consideration: *White and Tudor, L. C.* (Am. ed.) vol. 2, at p. 344; *Canavan v. Meek*, 2 O. R., at p. 646; *Boyd v. Johnston*, 19 O. R. 598; *British Canadian Loan Co. v. Tear*, 23 O. R. 664; *Beatty v. Fitzsimmons*, 23 O. R. 245; *The Frontenac Loan and Investment Society v. Hyslop*, 21 O. R. 577. The right of McLean against Lawrie passed to the plaintiff.

March 23rd, 1896. MEREDITH, J.:—

The plaintiffs sue upon a covenant contained in a deed bearing date January 8th, 1894, whereby, they allege, the defendant, Annie Lawrie, covenanted and agreed with her co-defendant, Daniel McLean, that she would pay the amount due upon certain mortgages subsisting upon lands conveyed to her by the deed, the benefit of which covenant they claim to be entitled to under an assignment thereof, of the same date, from her said co-defendant to them. The claim is thus, and thus only, stated in the pleadings.

The deed is produced, and it contains such a covenant; but it was never executed by the defendant, Annie Lawrie. The assignment is produced, and is by deed; but it is only of that covenant and the co-defendant's, Daniel McLean's, rights under it—a form of covenant contained in a deed which was never executed by the intended covenantor.

In these circumstances I failed to see how the plaintiffs

Judgment. could recover upon their claim on this covenant; but
Meredith, J. retained the case to enable Mr. McKay to furnish authorities in support of it. His subsequent diligence has been great; but it has failed to find any warrant for my giving judgment against a defendant upon a covenant contained in a deed which was never executed by her.

The old case of *Brett v. Cumberland*, Cro. Jac. 521, is not in these days a sufficient authority for it. That case and other old authorities were referred to in *Burritt v. Lynch*, 5 B. & C. 589, but were considered insufficient to warrant a judgment upon a covenant contained in a deed not executed by the intended covenantor though he took the benefits of the deed. Abbott, C.J., in delivering his judgment in that case said, at p. 602: "Then if some action will lie, the next question arises, what must be the form of the action? It has been contended that if an action will lie, it must be an action of covenant. I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who by himself, or some other person acting on his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those) mentioned in Co. Litt. 231a) has agreed by deed to do a certain thing. Here the defendant has not engaged by deed to perform the covenants, and consequently covenant will not lie." The same result appears from the case of *Witham v. Vane*, 44 L. T. 718: the plaintiff in that case, however, got over his difficulty in this respect, in the House of Lords, by a finding of fact there that there was a counterpart of the deed duly executed by the defendant: a report of the case there will be found in Challis on Real Property, pp. 341 to 366.

It may be that the defendant, Daniel McLean, has, under the authority of such cases as *Burritt v. Lynch* and *Moule v. Garrett*, L. R. 5 Exch. 132, or would have upon payment of the mortgages, a good cause of action at common law against his co-defendant for indemnity; and in equity he certainly would upon the obligation referred to

in such cases as *Waring v. Ward*, 7 Ves. 332, and *Walker v. Dickson*, 20 A. R. 96. But the plaintiffs cannot take the benefit of any such rights, for they had not acquired them before the commencement of this action; nor indeed at the time of the trial; their assignment is of the covenant, and the benefit and advantage of it only; and upon that covenant only they have sued.

The action in this respect must be dismissed, but without costs, no one having appeared for this defendant at the trial.

A. H. F. L.

MAY V. LOGIE.

Will—Construction—Absence of Material Words—Uncertainty—Devise.

A testator by his will provided as follows :—" It is my will that as to all my estate both real and personal, whether in possession, expectancy or otherwise, which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will " :—
Held, not void for uncertainty, and a devise to the testator's wife in fee.

THIS was an action brought by Albert E. C. May, who claimed under the heirs and heiresses of William Pidgen, deceased, to have the alleged will of William Pidgen declared void, and that William Pidgen died intestate, and that the plaintiff was entitled to certain lands of which the defendant was in possession.

As alleged in the pleading, the defendant claimed title from the executors of the estate of Elizabeth Pidgen, widow of William Pidgen, her claim to the lands being founded not only on the devise in the will, but also upon a sale by the sheriff of the county of York of the lands made to her in 1881, under a writ of *ven. ex.* issued in an action brought by one Charles Ruse against Elizabeth Pidgen as executrix of William Pidgen, upon a claim alleged to be owing to the plaintiff from the latter, the writ being against the lands of William Pidgen, deceased,

Statement. come to the hands of Elizabeth Pidgen as his executrix. The plaintiff alleged that the said sheriff's sale was necessarily void, having been made within less than twelve months from the delivery of the writ to him against the lands. William Pidgen died on November 2nd, 1878, and Elizabeth Pidgen on April 12th, 1884.

The alleged will of William Pidgen, dated May 25th, 1878, was in the following words: "I, William Pidgen, of the township of Etobicoke, in the county of York, yeoman, do declare this to be my last will and testament revoking all others by me heretofore made. It is my will that as to all my estate, both real and personal, whether in possession, expectancy or otherwise, which I may die possessed of, my wife Elizabeth (*sic*), and I hereby appoint my said wife Elizabeth to be executrix of this my will."

The other facts material to the present report, are mentioned in the judgment.

The action was tried at the non-jury sittings at Toronto, on March 2nd, 1896, before MEREDITH, J.

J. A. Donovan, for the plaintiff.

W. Mortimer Clark, Q. C., and *G. F. Shepley*, Q. C., for the defendant.

The following cases were referred to on the question of the construction of the will: *Greenwood v. Greenwood*, 5 Ch. D. 954; *In re Daniel's Settlement Trusts*, 1 Ch. D. 375; *Gwyn v. Neath Canal Navigation Co.*, L. R. 3 Ex. 209; *Pitman v. Stevens*, 15 East 505; *In re Bassett's Estate*, *Perkins v. Fladgate*, 14 Eq. 54; *Doe d. Hickman v. Haslewood*, 6 A. & E. 167; *Doe d. Pratt v. Pratt*, 6 A. & E. 180; *Parker v. Tootal*, 11 H. L. C. 143, 161; *In re Redfern*, *Redfern v. Bryning*, 6 Ch. D. 133; *Hope v. Potter*, 3 K. & J. 206; *In re Harrison*, *Turner v. Hellard*, 30 Ch. D. 390; *Sweeting v. Prideaux*, 2 Ch. D. 413; *Towns v. Wentworth*, 11 Moo. P. C. 526; *Hope v. Potter*, 3 K. & J. 206; *Pride v. Fooks*, 3 DeG. & J. 251, 266; *Jarman on Wills*, 5th ed., vol. 1, p. 451.

March 26th, 1896. MEREDITH, J. :—

Judgment.

Meredith, J.

The first and most substantial question raised by the parties is, whether the will set out in the pleadings, contains a valid devise of the lands in question, or is, as the plaintiff contends, "void for uncertainty."

The plaintiff claims title to the lands through the heirs at law, or some of them, of the testator; the defendant claims title—on this branch of the case—under the will.

The testator and his wife had lived together as man and wife upon these lands for many years before and up to the time of his death; they had no children, and he had no relations in this country. He died in November, 1878, and she continued to reside there, until, suffering from some incurable disease, she was taken to the Home for Incurables in October, 1883, and remained there until her death in April, 1884.

The lands by reason of their proximity to the city of Toronto, became at one time of great value; and were subdivided, and portions of them sold as town lots; so that from the small suburban farm which they were during the testator's long residence upon them, they have become suburban town lots with a church, stores and dwelling houses upon them, though mainly yet vacant lands awaiting sale in such lots.

Such possession as there has been, has always been held under titles derived through the testator's widow; and the title of all who have purchased and built upon and occupied any of these town lots, seem to depend upon her title.

No claim on the part of any of the testator's heirs at law seems to have been threatened until the year 1890; and the conveyance through which the plaintiff claims title from them, was not made until the year 1894.

The testator had, before making the will in question, made another; and he had shortly before making that in question, told one of the witnesses to it, that that former will did not give the property to his wife absolutely, and

Judgment. that he was making this will as he wished her to have it absolutely ; though, of course, that will not aid her if the will do not in fact so give it. It is not that which he intended or wished to do, but that which his will shews he wished that must prevail ; though it is right to state the material surrounding circumstances of the testator at the time of making the will, so that the reading of it may, as nearly as can be, be in the same light as that in which it was written.

Meredith, J.

The will is in the testator's own handwriting throughout ; and the case seems to afford another proof of the truth of the saying that a little learning is some times a dangerous thing. He seems to have had enough knowledge of legal expressions to lead him to discard plain simple words, of the meaning of which he could have had no doubt, and adopt somewhat technical forms and words which he was not able to mould with exactness to his wishes.

He doubtless took a printed form of a will as his guide. I have an indistinct recollection of just such a form of will, but whether contained in some book of legal forms and legal information for laymen, or in one of the blank forms of wills sold by stationers, I cannot call to mind.

However that may be, I have no doubt that a little less knowledge of legal forms would have led him to use simple words with which he was familiar, and which he could readily and accurately have put together so as clearly to express his meaning : or have led him to seek the assistance of some one skilled in legal phraseology, whose knowledge and skill would have saved the difficulty, contention and litigation which this man's endeavour to be his own lawyer has caused.

The will is in these words [The learned Judge here set out the will, as above given] : and the question I have to determine is, whether it contains a gift of the testator's estate to his wife, or is void, in so far as it purports to deal with his estate, for uncertainty.

Now three things are plainly shewn by the will : First,

it is the testator's last will, revoking all others; Second, ^{Judgment.} it is his will respecting all the property of which he should ^{Meredith, J.} die possessed; and, last, his wife is the only person named in it; the only person who can in any manner be considered as intended to be benefited by it, and she is also by it made his sole executrix.

Then as to the very words in question:—If the testator had written instead of them the words: "I will my wife all my estate real and personal," it would be no doubt said, on all hands, "that is a good and plain gift to the wife," and perhaps be added "and is grammatically accurate;" and yet it is not so unless the word "to" is understood before the word "wife." "I give to my wife all my estate," or "I give all my estate to my wife." Transposing thus the words first used, they would appear in this order: "I give all my estate, my wife." That would probably be said to be inaccurate—though no one would ordinarily suggest that the meaning was not apparent—but why? Why may not the preposition "to" be understood before the words "my wife" in this position as well as in the other? The only answer I could suggest, would be that it is usual in the first mentioned form but not in the last; it is usual to say, for instance, "I gave my wife that," but not, "I gave that my wife," though strictly speaking the one is quite as accurate as the other. Then, if it be as strictly accurate to say, "I will all my estate, my wife," as to say "I will my wife all my estate," and if the latter can be said to be an accurate expression, and if there can be no real doubt that the meaning of each is to give to the wife all the estate, it seems to me scarcely to require as much as a short step to uphold the validity of the devise of the lands in question in fee simple to the wife. Bearing in mind the three plain main features of the will, and the probable manner of its compilation, to which I have adverted, the words, "It is my will that as to all my estate," surely mean no more and not less than "I will all my estate," and the omission of the word "to" before the words "my wife Elizabeth," can make no more

Judgment. difference than the almost universal omission of it before
Meredith, J. the like words in the transposed use of them would.

In strict grammatical and legal accuracy, the testator should have said, "I devise and bequeath all my real and personal estate to my wife Elizabeth." Under the Wills Act that would have carried the fee simple in the lands in question, without using any words of limitation. But neither technical nor grammatical accuracy is required in wills or other legal documents. I fear if it were generally required, there are few writings of any character to which some objection might not be taken. No matter how ungrammatical, how inaccurate, how complicated, how clumsy, or how great the evidence of ignorance in its writing, effect must be given to the will of the testator in every particular in which his meaning can be gathered from anything contained any where within the four corners of the writing.

Upon the first reading of this will, it seemed to me that notwithstanding the clumsy handling of technical words by the testator, it was pretty plain, not only from the whole of the will, but also from the very words in question, that he had devised the lands in question to his wife; and further consideration of it but tends to strengthen that view; whilst if I had thought otherwise, a perusal of the cases, especially those of later date, would probably have constrained me to consider the devise good.

In *Doe d. Wickham v. Turner*, 2 D. & Ry. 398, the words: "I give further my yard, stable, cow-house, and all other outhouses in the said yard to my sister Martha Wickham to have the interest and profits during her natural life," were held to give an estate for life in the property to Martha Wickham, and to give the fee simple to Henry Wickham, mainly because of the use of the word "further," and because it was said the word "further" was never used elsewhere in the will than where there was a second bequest to a person previously named; and the next preceding gift was a gift to Henry Wickham. That was going a long way further, it seems to me, than need be gone in this case to uphold the devise in question.

The words of the will under consideration in *Re Basset's* Judgment. *Estate, Perkins v. Fladgate*, L. R. 14 Eq. 54, were: "After Meredith, J. these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister Mary Perkins, Pipin Pipin, Wisconsin, North America, without any power or control whatsoever of her husband, John Perkins; in case of her death to be equally divided amongst her children or grandchildren;" without any other words to indicate what the testatrix intended to leave to her sister; but Bacon, V.-C., found no difficulty in considering the words used a valid gift of the residue of the estate of the testatrix. He placed some stress upon the usual words of beginning wills, declaring them to be "the last will and testament" of the testator or testatrix. The will in this case, contains stronger words of that character, viz.: "I * * do declare this to be my last will and testament, revoking all others by me heretofore made," followed by the words: "It is my will that as to all my estate, both real and personal, whether in possession, expectancy, or otherwise, which I shall die possessed of."

The learned Vice-Chancellor used these words, words which have very considerable application to, and might be well adopted in this case, with, of course, this difference, that there the subject of the gift was, and here the object of the gift is in question:—"The intention of testatrix is express; if I could find any indication of an intention to give anything else, as for instance a legacy of £500, it would be different. But what other meaning can be attributed to these words except that which I have suggested? What answer can be given to the question, 'What did she mean to leave except this—the entirety of the residue of her estate?'" In this case, after the strongest sort of declaration that the whole of his estate was being disposed of by the will; what other answer can there be to the question, "to whom is it given?" than "his wife Elizabeth," or more accurately speaking, "to his wife Elizabeth."

There is no other object of his bounty in any manner howsoever suggested. I have used the word bounty, but

Judgment. perhaps using an expression in the moral (as contra-distin-
Meredith, J. guished from the legal) sense, a gift of this character—by an early settler in this Province, without children, to a surviving wife after many years of married life with her, during which in all probability the property was acquired, and acquired by her hard work and economy, as well as his, and a wife then possibly afflicted with the incurable disease of which a few years afterwards she died—would be much better described as an act of justice than of bounty.

The contention for the plaintiff is, of course, that the gift is invalid because of uncertainty as to the object, not of course the subject of it. And whilst I am told in one breath that I cannot rightly read into the will any words to give it grammatical meaning, I am in the next breath told in effect to read into it after the words, "my wife Elizabeth," some such words as, "shall hold it in trust" for some one. But if words are not to be read into a will to give it effect, they are very much less to be read into it, or read as if intended to be put in but accidentally omitted, in order to destroy it, to prevent it having any effect.

But in trust for whom? If the wife is to take at all, there is not the faintest indication that she is to take otherwise than for her own benefit absolutely.

In the will under discussion in *In re Harrison, Turner v. Hellard*, 30 Ch. D. 390, the testatrix had used a printed form, and had not filled in the blank left for the name of the legatee and devisee, but had filled in the blank left for the personal pronoun following, thus: " * * unto to and for *her* own use and benefit absolutely;" she had, however, in the beginning of the will filled in the printed form directing in the usual way payment of debts and funeral and testamentary expenses, by completing the printed part word "execut," making it "executrix;" and she had filled in the usual form of appointment of a personal representative with the words, "my niece Catherine Hellard," again changing the part word "execut" to "executrix." Under these circumstances, Kay, J., in the

first instance, and the Court of Appeal afterwards, without calling upon any one to support the will, held that the executrix, Catherine Hellard, took under the will as fully as if her name had been written in the space left for the name of the legatee and devisee.

Among the many interesting cases upon the subject of uncertainty and of supplying and transposing words in testamentary writings, I refer to *Prestwidge v. Groombridge*, 6 Sim. 171; *Pitman v. Stevens*, 15 East 505; *Doe d. Hickman v. Haslewood*, 6 Ad. & E. 167; *In re Daniel's Settlement Trusts*, 1 Ch. D. 375; *Sweeting v. Prideaux*, 2 Ch. D. 413; *Greenwood v. Greenwood*, 5 Ch. D. 954; *In re Redfern*, *Redfern v. Bryning*, 6 Ch. D. 133; *Mellor v. Daintree*, 33 Ch. D. 198, and *In re Jodrell*, *Jodrell v. Seale*, 44 Ch. D. 590, and [1891], A. C. 304.

Mohun v. Mohun, 1 Swan. 201, seems to be yet treated as an authority; the will in question there was in these words: "I, John Mohun, of the town of Cornfort, do make this my last will and testament. I leave and bequeath to all my grandchildren, and share and share alike. As witness my and seal, this 14th day of April, 1814."

On the same day the testator added the following words, without date, but attested by three witnesses: "And farther, I appoint Thomas Haswell and Thomas Eggleston my trustees for all my grandchildren and nieces; as witness my hand."

The Master of the Rolls held it to be void for uncertainty as to both subject and object. The judgment is very short, being wholly contained in these words: "This instrument presents ambiguity of every kind, uncertainty both in the subject and in the objects of the bequest; who are to take, and what is to be taken. The Court cannot insert or transpose words for the purpose of giving a meaning to instruments which have none."

But the case does not seem to me to militate against the validity of the will now in question; there the words added to the will in what was called a "codicil," made no doubt the uncertainty as to the object, felt by the

Judgment. learned Judge ; and as the word "all" was not without
Meredith, J. any meaning as it stood, "I give to all my grandchildren," there would seem to be some degree of uncertainty even if the word "all" would have been sufficiently certain if it had reference to the subject and not the object of the gift ; as to which see *Bowman v. Milbanke*, 1 Lev. 130.

It seems to me that the case would be very different if the words had been "I give to all my wife," for there "all" could not have any sensible reference to the object of the gift, but ought to, I think, without great difficulty, be held to refer to the subject of it.

I can hardly doubt that in these days the words, "I give to all my real and personal estate my wife," would be held a valid gift of all the real and personal estate to the wife. Omitting the word "to," the case would be stronger for the validity of the gift: "I give all my real and personal estate my wife," would surely in the absence of anything in the context to prevent it, be a valid gift to the wife, and the more plainly so after a declaration that it was the testator's last will, revoking all others, and respecting all the estate real and personal, of which he should die possessed.

The one respect in which this case presents to my mind any room for contention, is the use of words, "It is my will that as to," but under all the circumstances, they seem to me the same as if the testator had used the simpler words, "I will."

It would be strange and regrettable, if after the strong and clear declarations of the testator of his intention to die wholly testate, contained in his will, it were held that he died wholly intestate ; if it were held that the solemn act of making the will, was but what an eminent Judge has designated as a solemn farce.

The widow's title to the lands under the will in question is established ; and I need not consider the other grounds of defence pleaded.

The action will be dismissed with costs. Proceedings will be stayed for a month if the plaintiff desire it.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

ARMSTRONG V. LYE.

Equitable Assignment—Attorney for Sale of Lands—Authority to Pay Advance out of Proceeds—Subsequent Advance—Acknowledgment—Notice—Registry Act—Attorney Subsequently Becoming Purchaser—Lien—Personal Obligation.

The attorney under an irrevocable power from the owner, for the "sale or other disposition" of certain lands, subject to several charges, and who by agreement for value was entitled on the sale thereof, after payment of such charges, to a portion of the surplus, agreed in writing in the event of a sale to pay out of such surplus a further charge on the lands made by the owner subsequent to the giving of the power. The document creating the further charge was registered on the affidavit of a witness thereto, together with the agreement of the attorney to pay, and a statement by the plaintiff that he had advanced and an acknowledgment by the chargee and transfer by her to the plaintiff of the amount of the subsequent charge, the latter documents being registered without proof. Afterwards the owner of the lands conveyed, for value to himself and others, his equity of redemption to the attorney :—

Held, that any defect in the proof for registration of the documents was cured by section 80 of the Registry Act, R. S. O. ch. 114, and that the attorney was affected with notice of the whole transaction :—

Held, also, that the plaintiff had a lien upon the lands for the amount of his advance and interest, and that the effect of the transaction as to the further charge was to equitably assign to him so much of the proceeds of the intended sale of the lands as was equal to his advance, and that he was entitled to redeem the encumbrances existing at the time of his advance :—

Held, lastly, that the attorney was personally liable for the amount of the further charge, STREET, J., dissenting as to the last point on which the judgment of BOYD, C., was reversed.

THIS was an action tried before BOYD, C., at the Toronto non-jury sittings, on 26th October, 1894. Statement.

The following statement of facts is taken from the judgment of STREET, J. :—

On 8th May, 1891, Arthur Rankin since deceased, was the owner of a large tract of land in the district of Algoma, known as the township of Rankin, which was subject to a mortgage for \$39,000 to one George Gooderham, and to certain charges in favour of Messrs. Boswell & Cameron. Proceedings had been taken by Gooderham to recover the amount of his mortgage, and the lands had been ordered to be sold on 9th May, 1894, under the direction of the Court. At the request of Rankin, the defendant Lye, on

Statement. 8th May, 1891, entered into an agreement whereby he undertook to agree with Gooderham to pay off his mortgage within one year, and in the meantime to secure Gooderham collaterally to the extent of \$10,000. Rankin agreed to pay Lye \$500 within three months, and within the same period to pay off Gooderham's mortgage; failing which he created Lye his attorney, irrevocable, for the sale of the property, and agreed that Lye should, as his remuneration, retain one-third of the net proceeds of the property after payment of the Gooderham and Boswell & Cameron claims upon it.

At the time this agreement was entered into, Rankin was and had been for several years, liable to his niece Mrs. S. V. Hutchins, in the sum of \$6,000, upon a bond given partly for borrowed money and partly for other considerations. On 13th May, 1891, Rankin, at Mrs. Hutchins's request, signed an instrument in writing in the following words:

"I, Arthur Rankin, of the town of Windsor, do hereby agree, that in the event of my niece, Mrs. S. V. Hutchins, obtaining a loan or advance of money from any person, the same to the extent of \$1,200, and interest on not more than \$1,200 thereon at the rate of ten per cent. per annum, may be a charge by way of mortgage against my interest in the township of Rankin, in the district of Algoma, in Ontario; and I hereby authorize Henry Lye of the city of Toronto, my attorney for the sale of the said property, to pay the amount of the said loan to an amount not exceeding \$1,200, and interest as aforesaid, out of my share of the proceeds of such sale or other disposition of the property; and I sign this agreement on the understanding that my niece will apply the amount hereby made a charge on my property, if paid by me, on the bond for \$6,000 made by me to her in 1886. Dated this 13th day of May, A.D. 1891.

Witness, D. B. READ.

(Signed) A. RANKIN."

In the following October, Mrs. Hutchins took this in-

strument to the plaintiff from whom she had borrowed **Statement.**
\$500 some time before, and asked him to make a further advance, which he agreed to do upon getting some acknowledgment from the defendant Lye. Mrs. Hutchins thereupon procured from him a writing in the following words:

"Arthur Rankin of Sandwich, in the county of Essex, Ontario, having authorized me, as his attorney, to pay \$1,200 and interest at ten per cent. out of his share of the proceeds of the sale of the township of Rankin, after paying the mortgage to George Gooderham and all expenses, and the claim of Messrs. Boswell & Cameron and expenses, I hereby agree to pay it out of such share of proceeds, as soon as I receive them, to Robert A. Armstrong, should he advance the same to Mrs. S. V. Hutchins of Toronto, in the terms of the said agreement. (Signed) HENRY LYE."

"In the event of the return and cancellation of this agreement, the agreement made by Mr. Rankin in her favour, is to be returned to Mrs. Hutchins.

(Signed) HENRY LYE."

The latter clause is explained as probably referring to a duplicate of the previously mentioned document which Mr. Lye thought was left with him at the time, and which he thought at the trial he still held.

On 20th October, 1891, upon the above instrument with Mr. Lye's signature being produced to him by Mrs. Hutchins, the plaintiff advanced to her \$459 in cash, and gave up to her the securities he held for his former advance, the interest upon which, with the principal and the new advance of \$459, made up \$1,025.

At the foot of Mr. Lye's agreement the plaintiff then wrote as follows:—

"I, Robert A. Armstrong, of the township of Cavan, county of Durham, Ontario, have advanced \$1,025 to Mrs. S. V. Hutchins in compliance with above agreement this 20th day of October, 1891, which \$1,025 is to bear interest at the rate of ten per cent. per annum till paid.

(Signed) R. A. ARMSTRONG."

Statement.

And Mrs. Hutchins below this signed an acknowledgment that she had received the sum of \$1,025 and transferred to the plaintiff her interest under the agreements signed by Lye and Rankin, as security for the amount. All these instruments attached together were then deposited in the proper Registry Office on the 26th October, 1891, as No. 33, upon an affidavit by Mr. D. B. Read, of the execution by Rankin of the first of them. The certificate of registration is endorsed upon the back of the bundle of papers executed by Rankin, Lye, Armstrong and Mrs. Hutchins, above mentioned, which are all attached together, the last of them being the affidavit of execution.

On 13th April, 1892, another agreement was entered into between Rankin and Lye, in which, after reciting that Rankin had been unable to carry out his agreement of April, 1891: that Lye had become the purchaser of the Gooderham mortgage, and had agreed to purchase the Boswell and Cameron charges at Rankin's request, and that Rankin was desirous of further extending the time for sale of the said lands until 1st October, 1892, it was agreed that Lye should extend the time as requested, and that Rankin should pay him \$10,000 as a consideration for what he did at Rankin's request, in lieu of the one-third interest in the surplus proceeds of sale to which he was entitled under the former agreement, such sum of \$10,000 to be a charge upon the property.

On 1st November, 1892, for the expressed consideration of \$45,000, Rankin by deed conveyed his equity of redemption in the lands in question to Lye. This conveyance was registered on 8th November, 1892. By a contemporaneous agreement between Rankin and Lye the true consideration is stated as being made up of, 1st, the moneys due to Lye under the various agreements with Rankin, including the charges on the land assumed by him; 2nd, certain advances of money theretofore made by Lye to Rankin; 3rd, the indemnifying the said Rankin from liability of the said Rankin, if any, under and in pursu-

ance of a certain agreement between the said Rankin and Mrs. S. V. Hutchins, dated 13th May, 1891, and registered as No. 33; 4th, the payment of \$250 to other persons; and 5th, the payment to Rankin of \$100 a month during his life by Lye. Statement.

On 12th April, 1893, after the death of Arthur Rankin, Mrs. Hutchins brought an action against Lye and against George Rankin and Samuel V. Hutchins, the former being the administrator of Arthur Rankin, deceased, claiming as a creditor of Arthur Rankin under the bond from him to her to set aside the conveyance of the equity of redemption from Rankin to Lye as being fraudulent against her, or to be allowed to redeem the land. Lye answered that the conveyance to him was *bond fide* and for sufficient consideration. The action came up for hearing in January, 1894, and was dismissed without costs, and without prejudice to any action which might be brought to enforce the charge of \$1,200 against the property.

The present action was brought on 30th March, 1894, seeking to have it declared that the plaintiff was entitled to a charge for the advance of \$1,025 and interest upon the lands in question, and for a personal order for payment by Lye of the amount; or, in the alternative, for a judgment allowing the plaintiff to redeem. Mrs. S. V. Hutchins, her husband, S. V. Hutchins, and George Rankin, the administrator of Arthur Rankin, were also made parties defendant. The defendant Lye denied notice of the advance by the plaintiff to Mrs. Hutchins, and claimed to be an innocent purchaser for value with a registered title.

The learned Chancellor gave judgment as follows:—

November 17th, 1894. BOYD, C.:—

I do not think that Mr. Lye is personally liable to pay the sum claimed, but that it forms a lien on the lands in question. This is the effect of the document signed by Mr. Rankin on the 13th May, 1891, declaring that up to the sum of \$1,200 advanced to Mrs. Hutchins, the same

Judgment. shall form a charge by way of mortgage on his interest in
Boyd, C. the lands in question.

An advance was made by Armstrong on 20th October, 1891; and on the 26th October, 1891, the Rankin agreement was registered, having annexed to it the other papers, signed by Lye and Mrs. Hutchins, shewing the advance of \$1,025, as secured by a promissory note. Mr. Lye, as attorney of Rankin, 'agreed to pay what should be advanced on Colonel Rankin's order out of the proceeds of the property, then expected to be sold. But this event never happened. Instead of that the property was turned over to Mr. Lye on the nominal consideration of \$45,000; but the real transaction being that he should discharge the obligations standing against the land and pay an annuity of \$100 a year to the grantor.

No money has really come to the hands of Mr. Lye as the proceeds of the sale of the property, but he has bought the land subject to this charge in favour of Armstrong. The omission of Armstrong's name when the paper was signed by Lye does not appear to be material having regard to the nature of the whole transaction: *Re Queensland Land and Coal Co., Davis v. Martin*, [1894] 3 Ch. 181.

Armstrong is entitled to recover for the \$1,025 and interest at 10 per cent. till the note is due, and thereafter at 6 per cent. Though part of the \$1,025 represented a former advance, yet Mrs. Hutchins procured the release of securities and dealt with Armstrong on the footing of a practical advance of the whole sum, and I do not think it is open for Mr. Lye to question the transaction, as it was completed and evidenced as between them.

This \$1,025 and interest is to be charged upon the interest in the land of Mr. Rankin as it existed at the date of the advance. The Master will find out what was the nature and extent of the prior charges, whether due to Mr. Lye or others at that date, and the realization of the plaintiff's charge will be subject to these prior incumbrances.

The costs of the plaintiff will be added to his claim and realized out of the land, if there is no prior redemption.

In other respects the usual mortgage judgment for sale, and reference if asked. As to the other defendants, no costs.

Judgment.
Boyd, C.

Upon the argument I dealt with the question of registration, and still think that Mr. Lye is affected with notice of the whole transaction.

The plaintiff moved by way of appeal against this judgment, praying that the defendant Lye might be ordered personally to pay the plaintiff's claim, and that in default of payment by him, the lands might be sold subject only to the balance remaining unpaid of the charges existing upon it on 30th May, 1891, and for payment by Lye of the costs of the action.

The defendant Lye also moved to set aside the judgment, and to enter judgment dismissing the action with costs; or in the alternative, reducing the amount of the plaintiff's claim to \$459 and interest.

The defendant George Rankin also moved that the action as against him, might be dismissed with costs.

Mrs. Hutchins also moved to vary the judgment by having it declared that the defendant Lye is bound to indemnify her against the plaintiff's claim.

These motions were all heard together before the Divisional Court [ARMOUR, C. J., and STREET, J.], on 3rd December, 1894, and again on January 21st, 1896, before ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.

Watson, Q. C., and Ruddy, for the plaintiff.

Wallace Nesbitt, for Lye.

Hilton, for Lye and Rankin.

Walter Read, for Mrs. Hutchins.

March 27th, 1896. STREET, J. : —

The certificate of the registrar endorsed on the papers put in appears to cover the agreement by Rankin with Mrs. Hutchins of 13th May, 1891; the agreement of Lye

Judgment.

Street, J.

attached to it, and the transfer by Mrs. Hutchins to the plaintiff of her rights under the other instruments. These instruments must, therefore, be treated as having been *de facto* registered in October, 1891.

The defendant Lye contends that the registration must go for nothing, because the execution of the first of them only was proved. That, however, is a defect which seems to be cured by section 80 of the Registry Act, R. S. O. ch. 114, and the defendant Lye must be treated as affected with notice of all the instruments under the provisions of that section. Apart altogether, however, from the Registry Act, I think there is evidence upon which I should find express notice to him of the circumstances, including the advance to the plaintiff.

The result of the instruments so registered, was to create a charge on the land at the date of the advance, subject to the encumbrances then affecting the land, and to entitle the plaintiff to be paid the amount of his advance and interest out of the proceeds of any sale of the land which should come to Lye's hands after payment of such encumbrances. In other words, there was an equitable assignment by Rankin to Armstrong of so much of the fund to be derived from the sale by Lye of the land in question when it should be made, as should suffice to pay Armstrong's claim. This was a right which Lye could not defeat by purchasing the land himself, or by refusing to sell the land for Rankin; in either of those events, I think Armstrong would become entitled to come to the Court and ask to have the land sold to satisfy his claim. It is argued, however, that the fact that Lye himself having become the purchaser, and having, as part of his purchase money, paid certain sums of money to Rankin and others, has made him personally liable to pay the amount of Armstrong's claim, upon the ground that having become the purchaser, he must be taken to have received the proceeds of the sale; or if not liable to the full amount of Armstrong's claim, that he is, at all events, liable for so much of it as is equal to the cash he has paid to Rankin and others as part of the purchase money.

This contention raises a question upon which I have not been able to find any authority, and I can, therefore, only solve it by reference to what I conceive to be the principles applicable to such a state of things.

Judgment.
Street, J.

The liability of Lye personally to pay the money or any part of it, must depend, either upon a trust which he has not performed, or upon a contract which he has broken.

Assuming him to have been a trustee for sale for the benefit, first of Armstrong and next of Rankin, his position is, that he has refused to carry out the trust, and, instead of performing it, has himself become the purchaser. I can find neither reason nor authority for giving to Armstrong any further remedy against him than if he had simply refused to carry out the trust for sale, in which event the Court would have itself carried it out at the request of Armstrong, and he would have received the amount assigned to him out of the proceeds of the sale; the Court would not have punished the trustee for his refusal, without special reasons not found here, except perhaps by charging him with some costs; certainly not, I think, by ordering him personally to pay the debt.

If we are to consider the personal responsibility of Lye as resting not upon his position of trustee, but upon the contract which he entered into with Armstrong, it appears to me to be equally clear that no such responsibility is cast upon him.

The terms of the written undertaking into which he entered, and which must constitute his contract, if any, are not clearly expressed; and I think it is necessary to consider the position in which the parties stood at the time it was entered into in order fully to understand what is meant by it.

Rankin was the owner of the land subject to certain charges, and he had constituted Lye his irrevocable attorney for the sale of it. Rankin then charged the land in favour of Armstrong, with the payment of the latter's advance, and gave to Lye an order for payment of the advance out of the first proceeds of the sale of his equity of redemption.

Judgment.
Street, J.

Upon this order being taken to Lye, instead of simply acknowledging notice of it or agreeing simply to be bound by its terms, he gave to Armstrong a written promise of what he would undertake to do. He said, "Arthur Rankin, of Sandwich, in the county of Essex, Ontario, having authorized me as his attorney to pay \$1,200 and interest at ten per cent., out of his share of the proceeds of the sale of the township of Rankin, after paying the mortgage to George Gooderham and all expenses, and the claim of Messrs. Boswell & Cameron and all expenses, I hereby agree to pay it out of such share of proceeds as soon as I receive them, to Robert Armstrong, should he advance the same to Mrs. S. V. Hutchins of Toronto, on the terms of the said agreement."

Now it appears to me to be beyond question that in this contract Lye was dealing only with the expected event of his making a sale of the land on Rankin's behalf as his attorney, and of his receiving from some third person the purchase money, and that he had not in contemplation at all the event which actually did happen, namely, his becoming himself the purchaser of the land. The question, then, is whether a contract which expressly bound him to pay the plaintiff's debt in the event of his selling the land carried concealed within it a further contract to pay the plaintiff's debt in case he should buy the land. In my opinion, to hold that it did would be to make Lye liable for breaking a contract which he never made. Lye, however, was affected with notice of the plaintiff's charge upon the land, and cannot set up his purchase from Rankin for the purpose of cutting it out; and the plaintiff is, therefore, entitled to the same remedies he would have had if Lye had not acquired the equity of redemption, that is to say, to redeem the encumbrances existing at the time he became entitled to his charge, or to have the land sold subject to such encumbrances.

In taking the account directed by the Chancellor to ascertain the amount of these prior encumbrances, Lye will be entitled to credit for them as they existed when the

plaintiff's charge was created, irrespective of any reductions caused by payments which he has made from his own moneys. Reductions, however, which have been the result of payments (if any) by Rankin to the mortgagees, or from sales of portions of the mortgaged premises (if any) should be deducted from the amount of the charges with which Lye as the prior mortgagee is entitled to be credited. In specifying this I am merely answering arguments addressed to us by the plaintiff's counsel; I do not understand that I am in any way varying the judgment of the Chancellor.

Judgment.
Street, J.

I also agree that the plaintiff is entitled to a charge for the whole of the \$1,025, with interest upon it, and not merely for the \$459, the amount of the new advance. The plaintiff gave up the securities which he held for the former loan, which was overdue, and put the whole matter into a new shape, with an extended time for payment; and it appears to me that the language of the agreement signed by Rankin is sufficient to cover the whole transaction. If Rankin had stipulated for a share of the proceeds, or had been interested in an actual cash advance being made, a more stringent construction might have been necessary; but as he was not, the rearrangement of the past due debt along with the new cash advance may all well be treated as a "loan," the overdue amount being reloaned to Mrs. Hutchins upon the new security.

It was argued on the part of the plaintiff that the payment by Lye of the plaintiff's charge was by the agreement of 1st November, 1892, between Lye and Rankin, a part of the consideration for the conveyance of that date to Lye, and that upon the authority of *Mulholland v. Merriam*, 19 Gr. 288, and the class of cases which have followed it, Lye must be held a trustee for the plaintiff of so much purchase money. The stipulation, however, between Lye and Rankin was evidently intended not for the benefit of the plaintiff but of Rankin; it is not even a covenant by Lye that he will pay the plaintiff's debt, but that he will indemnify Rankin "from liability of the said

Judgment.
Street, J.

Rankin, if any, under and in pursuance of a certain agreement between the said Rankin and Mrs. S. V. Hutchins, dated the 13th day of May, 1891, and registered as No. 33."

The whole spirit of this provision is, not that Mrs. Hutchins or the plaintiff are to be benefited, but that Rankin is to be indemnified; there is no trust intended to be created for the plaintiff, and therefore he cannot claim any benefit under Lye's covenant with Rankin—a covenant which the latter might at any time have released without reference to the plaintiff: *Gandy v. Gandy*, 30 Ch. D. 57; *Faulkner v. Faulkner*, 23 O. R. 252.

I should, perhaps, not omit to remark that Rankin does not appear to have placed himself under any liability by the agreement between himself and Mrs. Hutchins, dated 13th May, 1891, beyond the creation of a charge upon his property, and as Lye takes the property subject to that charge by the terms of the agreement between him and Rankin of 1st November, 1892, it might not unreasonably be contended that all the liability of the latter was satisfied when the charge is declared to be effectual. It is true that in a roundabout manner Rankin's estate, if there were any to be administered, would be interested in requiring Lye to pay the loan from the plaintiff to Mrs. Hutchins, because Mrs. Hutchins would then be bound to apply it in part payment of her bond for \$6,000 against Rankin, and it might become a question whether the language of Lye's agreement to indemnify Rankin is strong enough to compel him to pay off the plaintiff at the instance of Rankin's administrator, in order that the estate might be *pro tanto* lightened of the burden of the bond. But these considerations do not arise in an action where Armstrong is seeking for payment of his debt, and the administrator is not asking Lye to pay it; Armstrong is not a creditor of Rankin's estate at all, and does not appear entitled to the judgment asked for against his estate.

In view of the relief granted to the plaintiff, Rankin's personal representative does not appear to have been a proper

or necessary party; he is not liable to pay the plaintiff's debt out of the estate if any, in his hands, and he has no interest in the lands covered by the plaintiff's charge nor in the taking of the account of the amount due Lye. He asks that the judgment may be amended by ordering the dismissal of the action as against him, and I think he is entitled to have it dismissed as against him, but without costs, as he acted by the same solicitor as the defendant Lye, and that in this respect the judgment should be amended.

Judgment.

Street, J.

As against Mrs. Hutchins, the plaintiff is of course entitled to a judgment for the amount of his claim in the usual form of judgment against a married woman. She is not entitled to be indemnified by Lye as asked by her notice of motion, against the plaintiff's claim.

The plaintiff's motion and that of the defendant Lye, having both failed, will both be dismissed without costs; that of Mrs. Hutchins will be dismissed with costs.

ARMOUR, C. J. :—

I agree with the judgment of my brother Street, except in this that I am of the opinion that the plaintiff is not only entitled to a charge upon the lands referred to, but also to a personal order against the defendant Lye for the payment of the amount so charged.

The state of the title to the said lands at the time that the plaintiff advanced the amount so charged, is shewn by the indenture of the 8th day of May, 1891, made between George Gooderham and the defendant Lye, and by the agreement of the same date made between Arthur Rankin and the defendant Lye, by the terms of which agreement the defendant Lye had become the attorney irrevocably appointed of the said Rankin for the "sale or other disposition" of the said lands.

On the 13th day of May, 1891, the said Rankin entered into the following agreement with Mrs. Hutchins, and gave the following direction to his said attorney, the defendant Lye: [The learned Chief Justice set out the agreement, *ante* p. 512.]

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Judgment. This agreement and direction the defendant Lye assented to by the following writing signed by him : [Setting out the document, *ante* p. 513.]
Armour, C.J.

Thereupon, on the 20th day of October, 1891, the plaintiff advanced the sum of \$1,025 to bear interest at the rate of ten per cent. per annum, till paid to Mrs. S. V. Hutchins.

The effect of these transactions was not only to give the plaintiff a charge upon the said lands for the amount of the said advance and the agreed interest, but also to equitably assign to the plaintiff so much of the proceeds of the sale of the said lands, to be made under the then existing agreements above set forth, as would equal the sum so advanced and the agreed interest, and the plaintiff thereby acquired a vested interest in the proceeds so to be obtained.

I cannot agree that by these transactions the defendant Lye became either a trustee for sale or a contractor, but merely an assentor to the said agreement and direction made by Rankin, and was bound to the same extent and no greater than if he had had merely notice of the agreement and direction, and of the advance made by the plaintiff, for what he signed did not alter the effect of the said agreement and direction, for their effect was to equitably assign the proceeds of the sale coming to Rankin after payment of the Gooderham mortgage and all expenses, and the claim of Messrs. Boswell & Cameron, and expenses, for these were prior charges; and so what the defendant Lye signed had but the effect of an assent by him to the equitable assignment created by the said agreement and direction.

The plaintiff having acquired a vested interest in the proceeds of the sale to be had under the then existing agreements, and being entitled to enforce a sale thereunder by the defendant Lye in order to obtain the fruits of his equitable assignment, the defendant Lye had no right, without the consent of the plaintiff, which he did not obtain, to change the then existing agreements and to put it out of his power to make the sale thereby contemplated,

and to defeat the plaintiff's equitable assignment, and having done so, he must be held to be personally liable to the plaintiff. Judgment.
Armour, C.J.

The defendant Lye must also, in my opinion, be held to be personally liable to the plaintiff, upon this ground, that having himself purchased the lands from Rankin by the deed of the 1st November, 1892, and having entered into the agreement of the same date, he cannot be heard to say that he did not thereby obtain the proceeds coming to Rankin of the "sale or other disposition" of the said lands, and upon the ground that he did actually receive and pay over to Rankin and to persons having claims subsequent to the claim of the plaintiff, more than enough to satisfy the plaintiff's claim.

On the argument I put this case to counsel, which is not distinguished in principle from the case in hand, without receiving any satisfactory answer to it.

A. sends \$1,000 worth of goods to B., an auctioneer, to be sold; he then gives C. an order on B. to pay C. \$500 out of the proceeds of the sale of the said goods, which C. takes to B., and B. assents to; A. afterwards goes to B. and agrees with B. that B. shall take the goods in satisfaction of a pre-existing debt of \$1,000 which A. owed B. Could B. under these circumstances be heard to say in answer to C.'s claim that he had never sold the goods, and consequently had never got the proceeds, and thus defeat C.'s claim?

I should say clearly not.

I think, therefore, that the judgment of my brother Street should be varied by this my judgment, and that the plaintiff should have judgment for the costs of the action and of his motion; and that the motion of the defendant Lye should be dismissed with costs. See *Smith v. Critchfield*, 14 Q. B. D. 873; *Haven v. Gray*, 12 Mass. 71.

FALCONBRIDGE, J.:—

I agree with the judgment of my Lord the Chief Justice for the reasons therein stated.

G. F. H.

FROWDE V PARRISH.

Copyright—Compilation—Proprietor—Residence in England—Copyright Through Agent—Stereotyping—Infringement.

A person, resident in England, who procures a book for valuable consideration, to be compiled for him, the compiler not reserving his rights, is the proprietor thereof, and entitled, either personally or through an agent in Canada, to copyright under the Copyright Act, R. S. C. ch 62. Printing and publishing the book from stereotype plates imported into Canada is a sufficient "printing" within the meaning of the Act, though no typographical work is done in preparation of the copies. American reprints of the plaintiff's copyright book added as an appendix to American reprints of the Bible imported into Canada, were held to be a violation of the plaintiff's rights.

Statement. THIS was an action tried before BOYD, C., at the non-jury sittings at Toronto on the 6th of April, 1896.

The action was for an infringement of an alleged copyright of the plaintiff, in which he claimed an injunction and damages.

The plaintiff was the manager of the Oxford University Press, of London, England, and claimed to be the proprietor of a subsisting copyright in a book called "Helps to the Study of the Bible," and to have duly printed and published it in Canada and duly entered it in the year 1890, according to the Copyright Act, in the Department of Agriculture, at Ottawa; and that the defendants had, subsequent to the plaintiff's registration of the copyright in Canada, imported and sold in Canada a number of American reprints of the book.

At the trial the following admissions were put in:—

1. The defendants admit that the plaintiff is the Henry Frowde named in the certificate of copyright in the possession of the plaintiff.

2. It is admitted that the plaintiff printed from the stereotype plates imported from England the Canadian edition of the book in question, namely, "Helps to the Study of the Bible," amounting to 1,000 copies, and deposited two of such copies with the department of Agriculture at the time of the application for the copyright, in accordance with the requirements of the Copyright Act.

3. That the said books comprising said Canadian edition were published in Canada as required by the said Act. Statement.

4. That subsequent to the registration of the said copyright the defendants, without the consent of the plaintiff, imported into Canada and sold copies of American reprints of said copyrighted book, some of which said copies were so imported and sold within two years before the commencement of this action.

5. That the books so imported and sold were known as the Holman Sunday School Teachers' Bible and the Potter's Sunday School Teachers' Bible or Potter Bible, and contained at the back of the Bible the "Helps" in question in this action.

6. It is also admitted that a copy of the declaration of William Briggs may be read instead of the original declaration filed with the Department of Agriculture at Ottawa, as evidence at the trial, and that the said declaration is the only document relating to said copyright filed with said department.

7. That the said defendants were not aware of the registration of the said copyright until notified by the plaintiff's solicitors on or about the 27th of September, 1895.

8. That the said "Helps" were compiled for the plaintiff by persons employed for valuable consideration for that purpose by him.

9. That at the date of registration of the said Canadian copyright there existed copyright in England.

T. W. Howard, for the plaintiff.

J. A. Macdonald, for the defendant.

April 18th, 1896. BOYD, C. :—

It is admitted that the book in question, "Helps to the Study of the Bible," was compiled for the plaintiff by persons employed for valuable consideration for that purpose by him. That arrangement, by virtue of sec. 16 of the

Judgment. Copyright Act, R. S. C. ch. 62, works a transfer of the right to obtain copyright if no reserve is made by the compilers or authors of the compilation. The person for whom the literary work is done, then, is entitled to the proprietorship of the copyright as "assignee," or, perhaps, "legal representative" of the author. See secs. 4 and 14 and 15 of the Act. Actual payment is not required to be proved under our Act: *Richardson v. Gilbert*, 1 Sim. N. S. 336.

The agent in Canada of the English proprietor, the present plaintiff, made application for and obtained copyright for the plaintiff as such proprietor on the 8th September, 1890. I do not follow the objection that the application might not be made under the 4th section of the Act, because the proprietor was resident in England. England is a part of the British possessions, and though by recent English legislation that term "British possessions" is after December 31st, 1889, to be construed as exclusive of the United Kingdom (see Interpretation Act, 1889, sec. 18, sub-sec. 2), yet in the earlier copyright Acts, from which this is derived, the term "British Dominions" (which is synonymous with "British possessions") is declared to mean and include all parts of the United Kingdom of Great Britain and Ireland (5 & 6 Vict. ch. 45, sec. 2): see *Low v. Routledge*, L. R. 1 Ch. 45, which case also shews that the most extended construction is to be given to the word "author" in these Acts.

I agree with the view expressed on this point by Street, J., in *Anglo-Canadian Music Publishers Assn. (Ltd.) v. Winnifrith*, 15 O. R. 164, 167.

The plaintiff continues to print and publish his book in Canada from stereotype plates. That is a sufficient "printing" within the meaning of the Act, though no typographical work is done in the preparation of copies.

No defence is raised on the ground that the plaintiff's copyright is invalid because of the expiry of the English copyright of this book. For this reason I suppose no evidence has been given on this head, as to the date of the English copyright.

The defendants bring in American reprints of the plaintiff's copyright book, which are added as an appendix to American reprints of the Bible. This importation is an invasion of the plaintiff's rights. "Importation" is specially mentioned as a violation of the Act in section 30, where penalties are imposed.

Judgment.

Boyd, C.

The defendants were not aware of the existence of the plaintiff's copyright till the 27th September, 1895. The action is on the 11th October, 1895. Sales have been made by the defendant for four or five years before this and also after action. The parties wish me to settle damages if I find in favour of the copyright. I fix the sum at \$40 (unless either party asks a reference); and the plaintiff should get costs.

That an action may be brought for injunction and damages recovered in case of importation appears from *Cooper v. Whittingham*, 15 Ch. D. 501, and *Tennyson v. Forrester*, 43 Scottish Jurist 278, quoted in Copinger's Law of Copyright, 3rd ed., p. 247.

G. F. H.

YOUNG V. ERIE AND HURON RAILWAY COMPANY.

Mandamus—Action for—Rule 1112—Railways—Damages—53 Vict. ch. 28, sec. 2 (D.).

The prerequisites to be observed to obtain a prerogative writ of mandamus are not essential where there is a right of action for a mandamus, namely, where under Rule 1112 the plaintiff is personally interested in the fulfilment of a duty of a quasi public character, as in this case the omission of a railway company to properly fence their tracks.

The damages under section 2 of 53 Vict. ch. 28 (D.), are limited to injuries caused to animals by the company's trains or engines; damages incurred in watching cattle by reason of the bad state of the fences, are not recoverable.

Statement.

THIS was an action brought against the Erie and Huron Railway Company, for a mandamus to compel the company to construct proper fences between its line of railway where it crossed the plaintiff's lands; and also for damages sustained by the plaintiff for his trouble and loss of time in watching his cattle, to prevent them getting on the railway lands, by reason of the defendant's neglect in the construction of such fences.

The action was tried before BOYD, C., and a jury at Chatham, on the 10th and 11th March, 1896.

Fraser (of London), for the plaintiff.

A. W. Anglin, for the defendants.

Prior to the commencement of the action, two notices were given to the manager of the railway, requiring the construction of the fences and crossings.

The jury found that proper fences had not been erected, and that the plaintiff was entitled to damages for the six years prior to the commencement of the action, namely:—\$50 for each of the first four years, and \$25 for each of the last two years.

It was objected that no sufficient demand had been served on the defendants, and that the plaintiff was not entitled to the damages claimed.

The learned Chancellor reserved his decision on the legal questions raised, and subsequently delivered the following judgment: Statement.

March 18th, 1896. BOYD, C. :—

I am of opinion that all the prerequisites to be observed in order to obtain the prerogative writ of mandamus are not required where the plaintiff has a right of action for mandamus.

That right is defined by Rule 1112, and it exists where the litigant is personally interested in the fulfilment of a duty of a *quasi* public character.

As put by Erle, C. J., in *Fotherby v. Metropolitan R. W. Co.*, L. R. 2 C. P. 188, at p. 194, wherever a statute gives a right to a person to have an act fulfilled by another, and that other does not fulfil it, a cause of action arises. That would be (as said in that case) a substantive cause of action for which at least nominal damages may be recovered so as to carry costs in mandamus. But the recovery of damages is not essential in order to maintain an action for mandamus.

Here the finding of the jury has very clearly established that the plaintiff's land intersected by the defendants' road has never been separated from the track by fences of the height and strength of an ordinary division fence as provided by the Railway Act, 51 Vict. ch. 29, sec. 194 (D.). That was the substantial dispute between these parties, and upon the result of the jury's deliverance the plaintiff is entitled to have it so declared, and after a fitting opportunity to make a right fence as defined by the jury to have the finding specifically enforced by a writ of mandamus.

As to the damages found by the jury in respect of the trouble incurred in watching cattle on account of the bad state of the fences, I do not think that these are recoverable as a consequence of the neglect on the part of the company to observe the directions of the statute. The penalty that follows non-observance is given by the statute 53

Judgment. Vict. ch. 28, sec. 2 (D.), and it is limited to injury caused to animals by the company's trains or engines. There is no common law liability to fence, and the obligation being imposed by statute, the responsibility thus cast upon the company is to be measured by the language of the statute.

Boyd, C.

G. F. H.

[DIVISIONAL COURT.]

DAVIS V. DAVIS.

Will—Election—Period of Accounting—Interest.

• Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will :—

Held, that her election related back to, and she was liable to account from, the date of the testator's death ; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime.

Statement. ISAAC DAVIS died on the 24th January, 1888, having by a will dated the 12th December, 1884, disposed of his estate as follows :—" I devise and bequeath all the real and personal estate which shall belong to me at my decease unto the use of my dear wife Harriet Davis and my son David Davis, upon trust to permit my said wife to receive the income and profits arising from my said trust estate, both real and personal, for the term of her natural life, and from and after the death of my said wife, then upon the trusts set out in a codicil to this my will, bearing even date herewith, and which said codicil is not to be opened until after the death of my said wife Harriet." He also named the trustees as his executrix and executor. By the sealed codicil, he disposed of all his estate among his children, *inter alia* of two stores in Yonge street, in the city

of Toronto, which (after the death of his wife) he devised Statement.
one to his son Julius and the other to his daughter Lucille.

Owing to the protest of David, the sealed codicil was not opened until the 7th March, 1889.

The widow, without proving the will, assumed the whole management and received and spent all the income and profits of the estate from the time of the testator's death up to the 10th January, 1893, when, on the executrix and executor being cited to prove the will, at the instance of a person bringing an action to recover a sum alleged to be due to him by the testator, the widow renounced probate, which was granted on the 18th January, 1893, to David as sole executor.

The widow, in whose name the testator had in 1877 purchased the two Yonge street stores, now claimed them as her own. The executor, however, in swearing to the testator's estate, included the two Yonge street stores, and later on, being notified by the Surrogate Judge to pass his accounts, asked his mother for a conveyance to him of the two Yonge street stores in trust for the estate, and for an account of certain rents of other real property, of moneys in the Bank or Toronto, of debts due the testator collected by his widow, and generally, but she declined to give any account.

This action was brought by the executor against the widow to compel a conveyance to him of the two Yonge street stores for the purposes of the trust, and for an account of the testator's estate, she having exclusively managed the same since the testator's death.

STREET, J., on the 22nd October, 1895, gave judgment, declaring the two Yonge street stores to be the absolute property of the widow, freed from any resulting trust in favour of the estate, ordered the widow to elect whether she would take under or against the will, and directed an accounting, having reference to the election.

The widow elected against the will, and on an accounting before J. S. Cartwright, an official referee, was found to have received the sum of \$6,827 belonging to the testa-

Statement. tor, and to have properly expended the sum of \$339.19, which, with \$487.13, her interest by way of dower in a house in John street, left a balance due to the estate by the widow of \$6,001.28. The referee did not, however, charge the widow with any interest, on the ground that the children should have at an earlier stage put her to her election, and, not having done so, could not ask interest.

The defendant, the widow, appealed in respect of several items in the referee's report, and generally on the ground that she should only be ordered to account from the date of the opening of the codicil, not from the testator's death.

The plaintiff cross-appealed, claiming interest from the testator's death.

The appeal and cross-appeal were argued before a Divisional Court composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 7th and 8th April, 1896.

D. Macdonald, for the defendant. On the question as to the date on which the accounting should have taken place, the widow, having been given by the will a life interest in all the testator's estate, governed herself as to her mode of living and otherwise accordingly, and could not know of her changed position under the codicil till it was opened. By express direction of the testator it was not to be opened till after the widow's death. There was no duty cast upon her to open it sooner, and when it was opened she was only bound by it from that date. The widow could obtain limited probate of the will without the codicil: *Howell's Prob. Prac.*, 2nd ed., p. 178. Even if the general rule be that, where a person elects against the will, he must account for all he has received under it from the date of the testator's death, if so much be required to compensate those disappointed by his so electing, yet this case is different; the widow not knowing her true position, by reason of the testator's own prohibition, until the codicil was in fact opened and the contents made known. The learned referee was right in not charging the widow with interest.

Marsh, Q. C., and G. G. S. Lindsey, for the plaintiff. *Argument.*
The widow having elected against the will, and so disappointed Julius and Lucille as to the property taken, she must compensate them; and it is admitted that all that the widow would have taken under the will is not enough to compensate the disappointed legatees. When election is made against the instrument, after money or other property, capital or income, has been received under it, the same must be brought into account for the purpose of compensation being made out of them. To this extent the election relates back: Serrell on Election, p. 156. The date to which it would relate would naturally be the date at which the person was first liable to be put to election. If at that time she had elected against the instrument, she would have taken nothing under it until compensation had been fully made; and her position ought not to be the better because she did not make the election till some time afterwards. In *Gretton v. Harward*, 1 Swanst. 409, it was held that an estate, devised but lost to the devisees by their electing to take against the will, must be accounted for from the death, and the devisees, having been in possession, must account for the rents and profits of it, paying an occupation rent and being allowed all sums spent in the amelioration of the estate. The election is retrospective, reverting to the time of the decease of the testator; the party electing against the instrument rejects all that comes under it; consequently, when she has, in the interval between the death of the testator and the time of election, enjoyed the rents and profits of the property left to her by the will, she must, when she elects against the will, account for the rents and profits by way of compensation to the persons who are disappointed by her election. To retain past rents and profits which she has received with no other title than that conferred by the will, would be to claim under the will, and she cannot claim under it and at the same time elect against it. In *Padbury v. Clark*, 2 Ha. & Tw. 341, a devisee of leaseholds who elected against the will had to account from the

Argument. testator's death. See also *Codrington v. Lindsay*, L. R. 8 Ch. 578. The widow assumed to deal with the estate to the exclusion of her co-executor, and she should have at once proved the will, when the codicil would necessarily have been opened. Probate of the will without the codicil will not be granted: *Howell's Prob. Prac.*, 2nd ed., p. 46. The widow should pay interest from a year from the testator's death. She was trustee, and received the money and used it, and, not having invested it, must pay interest. Even if she received the money, believing she had a right to use it for her own benefit, she must pay interest: *Inglis v. Beaty*, 2 A. R. 453.

At the conclusion of the argument the judgment of the Court was delivered by

BOYD, C.:—

The principle governing the equitable doctrine of election is that where, by electing against the instrument, the person so electing deprives another of any interest which that other would otherwise take under the instrument, then compensation must be made to him who is disappointed in so far as the same is capable of being made out of the beneficial interest rejected by the person so electing; and the election relates back to the time when election can first take place, that is, to the testator's death.

There is no reason for departing from the rule here. The widow assumed control of the estate immediately on her husband's death; and, being intrusted as executrix with its management, should at once have proved the will, when the codicil would necessarily have been opened and its contents known. Then she would have been obliged to elect. Suppose the widow had not opened the codicil till now, could she contend that she should only account from now? We think not. Compensation to those disappointed by the election is the basis of the doctrine of election, and this can only be made effective in a case like this by an accounting from the death.

We think, however, as the widow was not called upon Judgment.
to elect till this action was brought, she should not be Boyd, C.
charged with interest in the meantime upon the moneys
which came to her hands under the will, while it was
assumed by all parties that she was a beneficiary under
the will.

In the result, both the appeal and cross-appeal will be
dismissed without costs, but without prejudice to the exe-
cutor applying to be allowed his proper costs of these
appeals on passing his accounts.

E. B. B.

IN RE WILLIAM RODDICK.

Insurance—Voluntary Settlement—R. S. O. ch. 136.

A benefit certificate in a mutual insurance society was expressed to be payable to the insurer's mother, and by contract between him and the society it was agreed that it should not be payable nor could it be transferred to any one else than his mother, wife, children, dependents, father, sister or brother; and that if he died without having made any further direction as to payment the money should be paid to the beneficiaries in the above order if living.

The insurer died intestate, unmarried, his father and mother predeceasing him, but two sisters survived who were supported by him and claimed the policy moneys in the character of "dependents" as well as "sisters." His estate, was insolvent and his administrator claimed that the money was assets for the creditors:—

Held, that the insurance amounted in effect to a voluntary settlement on the sisters of the insured, who though not within the protection of R. S. O. ch. 136, were beneficiaries named in the policy, and as it was not shewn that the insured was not in a position to make a voluntary settlement at the time he effected the insurance, or at any time, they were entitled to the money.

THIS was a special case submitted by Eliza Roddick and Mary Roddick, sisters of William Roddick, deceased, on the one part, and Robert G. Wilson, the administrator of the estate of William Roddick, on the other part.

The case set out that on February 16th, 1888, William Roddick made a written application to the Supreme Tent of the Knights of the Maccabees of the World for membership therein and for the issue to him of a benefit certificate

Statement. for \$2,000, to be made payable to Catherine Roddick, his mother; and by the application which was stated to be a part of the contract between William Roddick and the Supreme Tent, it was agreed between the parties thereto that the benefit certificate should not be made payable to any person other than the wife, children, dependents, father, mother, sister, brother, or betrothed of William Roddick; nor could the certificate be transferred or assigned by him to any other person than the above named, and also that in case William Roddick desired to change the beneficiaries named in his certificate he should make a written request therefor, and deliver the same with his certificate and the sum of fifty cents to the record keeper of his Tent, and on receiving such written request the record keeper should forward the same to the Supreme Record Keeper, who should thereupon issue a new certificate; and it was further agreed that if William Roddick should die without having made any direction as to payment, that the same should be paid in the following order, if living: 1, widow; 2, children; 3, dependents; 4, mother; 5, father; 6, sister; 7, brother; that the said certificate was duly issued to William Roddick on March 5th, 1889; that the Supreme Tent of the Knights of the Maccabees was a corporation duly authorized to issue such benefit certificates; and that among its rules in force at the time of the application and issue of the certificate in question and which formed part of the contract were the following:—Section 10. "No beneficiary or endowment certificate shall be made payable to any person other than the wife, children, dependents, mother, father, sister or brother of the member, nor can any such certificate be transferred or assigned by a member to any other person than above * * ." Section 11. "In the event of the death of all the beneficiaries named by the member before the decease of such member, if no other disposition be made thereof, the benefit shall be paid to the beneficiaries of the deceased member first in the order named in the preceding section; and if no person or persons shall be

found entitled to receive the same by the laws of the order, Statement.
then it shall revert to the endowment fund of the association." Section 175. "In the event of the death of the beneficiary or beneficiaries named in the certificate of membership before the decease of such member, if no other designation be made, the benefit shall be paid, first, to the widow, if living; if no widow, to the children; if no children, to the dependents; if no dependents, to the mother; if no mother, to the father; if no father, to the brothers and sisters, share and share alike. And if no person or persons shall be found to receive the same, then it should revert to the benefit fund of the order."

The special case then alleged that the certificate was issued with certain conditions specifically set forth therein, amongst them the following:—(1) No beneficiary or endowment certificate shall be made payable to any person other than the wife, children, dependents, father, mother, sister or brother of the member, nor can any such certificate be transferred or assigned by a member to any other person than the above; that the mother of William Roddick died in 1893; that no change was made in the certificate, but William Roddick relied upon his contract with the Supreme Tent and the rules of the Supreme Tent above referred to and the conditions in the certificate, namely, that his dependents, who were his sisters, were his beneficiaries; that on November 5th, 1895, said William Roddick died intestate; that he was never married, and had no children, and left neither father nor mother surviving, and that the only claimants for the moneys which had been paid into Court were Eliza Roddick and Mary Roddick, sisters of William Roddick, and the administrator of William Roddick, who respectively claimed to be entitled to the same, the latter on behalf of the creditors of the deceased.

It was admitted that the estate of William Roddick was insolvent, but there was no attempt to shew that there were any debts owing by William Roddick at the time that he applied for and obtained the certificate in question.

Argument. The case was argued on May 6th, 1896, before STREET, J.

Duncan, for the administrator. The case comes within R. S. O. ch. 136, as amended by 51 Vict. ch. 22, sec. 2, and 55 Vict. ch. 39, sec. 37, and all persons entitled having died before the insured, the money should form part of the estate of the deceased. The terms of the contract and the rules of the society cannot prevail against the statute: *Mingeaud v. Packer*, 21 O. R. 267; *S. C.* in App. 19 A. R. 290; *Re Neilson*, 24 O. R. 517; *In re Eaton*, 23 O. R. 593.

J. A. Patterson, for Eliza Roddick and Mary Roddick, cited *Morgan v. Hunt*, 26 O. R. 568.

STREET, J. :—

There is in effect a voluntary settlement on the sisters of the insured; they are not within the protection of R. S. O. ch. 136, but they are beneficiaries named in the policy; it is not shewn that the insured was not in a position to make a voluntary settlement at the time he effected this insurance or at any time, and therefore it should stand.

No further amendment of the case is asked for, and so I order that the money be paid out to the two sisters, Eliza Roddick and Mary Roddick, less the costs of the proceedings, to be first taxed and paid out of the fund as agreed by the special case.

A. H. F. L.

IN RE STONEHOUSE AND THE CORPORATION OF THE
TOWNSHIP OF PLYMPTON.

*Municipal Corporations—Drainage By-law—Engineer's Report—
Erroneous Basis of Fact.*

A township by-law for repairing and deepening a drain extending through three municipalities set out the report of the engineer recommending the work and assessing the cost in different proportions against them, respectively, but he based his report upon the assumption that the drain had been originally constructed as one drain whereas it consisted of at least two drains built at different times and for different purposes :—

Held, that the by-law must be quashed, for the persons affected were on being assessed entitled to have the engineer's judgment upon the true state of facts, as was also the council when acting on his report.

THIS was a motion to quash by-law No. 3 of 1895, of Statement.
the corporation of the township of Plympton, entitled :
“A by-law to provide for the repairing and deepening
throughout of what is known as the Stonehouse drain, in
the townships of Plympton, Enniskillen, and the village
of Wyoming.” The grounds set out in the notice of mo-
tion were that the drainage work proposed by the by-law
was not one authorized by the statute and was *ultra vires*
the corporation ; that the by-law assumed control of a
drain constructed by the township of Enniskillen and
under their control, and the corporation of Plympton had
no jurisdiction whatever over it or to flow water down it ;
that if the township of Plympton had a right to flow
water down the drain in Enniskillen, the repairs of the
said drain within the limits of Enniskillen must be made
by that township, and the township of Plympton had no
jurisdiction to make them ; that the proposed work ex-
ceeded the intention of the original work and could not be
done, or the money required raised by local assessment
without a petition and other preliminaries as provided in
the statute ; that no sufficient, if any, by-law was passed
for the construction of the original work in either of the
townships of Plympton or Enniskillen or the village of
Wyoming ; that the township of Plympton had not by any
legitimate exercise of their powers laid out any drain
within the grounds of the township of Enniskillen, nor

Statement. had the engineer in charge of the proposed work that object in view; that the judgment of the engineer was fettered by instructions received from the officers of the corporation or other persons; that the councils of the townships of Plympton and Enniskillen and the village of Wyoming collusively agreed on the provisions of the by-law, and the assessment on the municipalities thereunder to the prejudice of the persons assessed thereby, and land-owners along the course of the said drain; that the engineer adopted an improper mode of ascertaining the proper assessment against the township of Enniskillen and generally proceeded upon a wrong principle in making the assessments for benefit and outlet; that the engineer's report, on which the undertaking of the said work was based, was insufficient to justify the proposed work; that the provision for maintenance of the proposed work was illegal and not justified by the statute or the facts; that the assessments under the by-law were so indefinite that they could not be enforced, and the by-law would thereby be rendered inoperative; and, lastly, that the cost of the proposed work was out of proportion to the benefit that could be derived thereby and the original work.

The by-law in question recited that notice in writing had been served on the municipal council of the township of Plympton by a resident ratepayer affected by the said drain that the Stonehouse drain was out of repair, and requiring the same to be repaired; and that in order to carry off the water originally designed to be carried off by the said drain, and to prevent damage to adjacent land it had become necessary to repair, deepen and widen the drain; and that the council procured an examination to be made by John H. Jones, P. L. S., of the drain, and also plans, specifications and estimates of the work, etc., and then set out the report of their said engineer, which stated as follows:

"I have the honour to report that in accordance with instructions received from your honourable body, I have made a survey and examination of the Stonehouse drain

in the first concession of your township from the village of Wyoming to the town line of Enniskillen. I also found it necessary to continue my survey and examination down the said Stonehouse drain into the township of Enniskillen to the south end of the west half of lot 11 in the thirteenth concession. I also made an examination of the whole of the territory drained by the said Stonehouse drain. I found that the said drain is very much out of repair throughout, both in the townships of Plympton and Enniskillen, and is insufficient to carry off the water that it was originally designed to carry off. In order, therefore, to make the said drain efficient and to prevent damage to adjacent lands I beg to report and recommend that the said Stonehouse drain be repaired, deepened and widened throughout from the outlet south end of west half lot 11, in the thirteenth concession of Enniskillen, northeasterly to the boundary line of the village of Wyoming. I find that the proposed improvements to the said Stonehouse drain will benefit and afford better outlet for certain lands and roads in the townships of Enniskillen and Plympton, and also the village of Wyoming." Statement.

He then stated that he had made a profile for the proposed work and set out specifications for it and an estimate of the cost, and that he had assessed a certain sum against the lands and roads in Wyoming, and leave having been given by the referee appointed under the provisions of the Drainage Trials Act, a certain further sum against certain lands and roads in Enniskillen, and that he had assessed a certain further sum against lands and roads in Plympton for the cost of the repair and enlargement of the said Stonehouse drain, and that when the enlargement of the said Stonehouse drain therein reported upon was fully made and completed it should be maintained and kept in repair in the township of Enniskillen by the corporation of Enniskillen at the joint expense of the three corporations in the same proportions as the above assessments, and the portion in Plympton should be kept in repair by the corporation of Plympton

Statement. at the joint expense of it and Wyoming in similar proportions. He then set out in detail the assessments on the various lots and roads.

The by-law in the usual way adopted the report, plans, specifications, etc., of the engineer and enacted that the work should be done accordingly.

A number of affidavits were filed on either side, the contents of which it is not material to the present report to mention, nor were any authorities cited upon the point on which the decision turns.

The motion was argued on May 7th, 1896, before STREET, J.

Aylesworth, Q.C., and *Shannesey*, for the motion.

Shepley, Q.C., and *Cowan*, for the corporation of Plympton.

STREET, J. :—

By-law quashed with costs upon the ground that the engineer has based his report, which is the basis of the by-law, upon the erroneous assumption that this is all one drain, which was originally insufficient to carry off the water for which it was built; whereas, it consists of at least two drains, built at different times and for different purposes. The persons affected are entitled to have his judgment in assessing them upon the true state of facts, because he might have assessed the Enniskillen lands (*e.g.*) for a lower sum had he made his estimate upon the basis that the Enniskillen drain was not a part of the original system, but was itself a separate original drain designed to carry off only the natural soakage and not the volume brought upon it at times by the Plympton drain. The council in acting upon his report are to base their action upon a true and not an untrue view of the history and object of the original drains, and they have only the engineer's report as their guide in legislating upon the work and assessing its cost.

A. H. F. L.

MARTIN V. SAMPSON.

Chattel Mortgage—Affidavit of Bona Fides—Money not Actually Advanced at the Time—Invalidity of Mortgage.

A chattel mortgage to secure a present advance of money, regular in every other respect, was duly executed and filed in the proper office, but the consideration money was not actually paid over until four days after the filing, nor was there any binding agreement at the time of the execution and filing between the parties that the money should be advanced:—

Held, that the mortgage was invalid.

THIS was an action brought by T. B. Martin against William Sampson and H. R. Angus to have declared void and set aside a chattel mortgage executed by Angus to Sampson on May 1st, 1895, purporting to secure \$1,000 with interest. The chattel mortgage was filed on May 3rd, 1895, and the affidavit of *bona fides* which was duly sworn stated that Angus was justly and truly indebted to the mortgagee in the sum of \$1,000, and was sworn on May 2nd, 1895. As a matter of fact the money had not then been advanced, nor was Angus indebted to the mortgagee in any sum on that day. Statement.

On May 11th, 1895, Angus made an assignment for the benefit of his creditors, and the plaintiff was the assignee. Sufficient of the goods and chattels covered by the chattel mortgage had been sold before suit to cover Sampson's claim, and the proceeds had been paid into the Bank of Hamilton to the credit of the solicitors of the plaintiff and Sampson to abide the result of this action.

The action was tried at Hamilton on April 13th, 1896, by MACMAHON, J.

J. J. Scott, for the plaintiff.

Hamilton Cassels, for the defendant Sampson.

J. N. Waddell, for the defendant Angus.

The following cases were referred to on the argument:—*Marthinson v. Patterson*, 19 A. R. 188; *Ex parte Bolland*, *In re Roper*, 21 Ch. D. 543; *Darvill v. Terry*, 6 H. & N. 807; and *Clarkson v. McMaster*, 25 S. C. R. 96.

Judgment. April 25th, 1896. MACMAHON, J.:—

MacMahon,
J.

At the conclusion of the trial I made the following findings:—

In this case it is admitted that the mortgage is a perfectly valid mortgage between the parties to it. The mortgagee, Mr. Sampson, was approached by Mr. Henry Barber, of Toronto, a friend of the mortgagor, who enquired if he had any money to invest, and he received an answer to the effect that he was prepared to make an advance on ample security, and after negotiation the matter was placed in the hands of the mortgagee's solicitors, who prepared the mortgage and had it executed, the affidavit being sworn to on the 2nd of May, 1895, five days prior to the actual paying over of the money. The mortgage was filed in the office of the clerk of the County Court of the county of Wentworth, being the proper office in that behalf, within the time prescribed by the Act, namely, on the 3rd of May. In all essential particulars except the one that is raised by this litigation, the mortgage, as I said at first, was a perfectly valid mortgage as between the parties to it.

In addition to the written admissions put in at the trial, it was admitted that at the time of the giving of the chattel mortgage Angus was insolvent, but Sampson was not aware of his insolvency, either when the mortgage was given or when the money was paid over.

There was no written agreement binding the mortgagee to make the advance, the consideration being paid solely on the strength of the mortgage having been executed, and that it was a valid and sufficient security. And there being the most absolute good faith in connection with the taking of the mortgage, were it possible to do so, I should hold that the mortgage was good for the amount of the advance.

On the 7th of May—the day on which the money was paid—the mortgagee might have taken a fresh mortgage, which would have made the transaction a perfectly valid

one; or he could on that day have discharged the mortgage then on file, and by taking absolute possession of the goods as security for the amount of the advance that day made, he would have been perfectly protected. Or had Sampson on the day he swore to the affidavit left his cheque payable to his solicitors, and Angus had assented that it should be so received and retained by them in trust for him until the requisite certificates had been procured from the county clerk, and from the sheriff, shewing that it was a sufficient and valid security, the transaction could not, I venture to think, be successfully impeached.

Judgment.
MacMahon,
J.

The affidavit of *bona fides* was not true, no money having been advanced when the affidavit was made, and the mortgage is thereby rendered invalid. *Marthinson v. Patterson*, 19 A. R. 188, does not go far enough to make it an authority governing this case.

The mortgage being invalid, it could not, since the Act of 1892, 55 Vict. c. 26, s. 4 (O.), be validated by the mortgagee taking possession of the goods on the 10th day of May: *Clarkson v. McMaster*, 25 S. C. R. 96.

There must be judgment for the plaintiff for the amount paid into the Bank of Hamilton under the agreement between the parties, together with the accrued interest (if any) thereon.

It is certainly, under the circumstances, not a case for costs, and the judgment will be without costs.

A. H. F. L.

This case is standing for argument before the Court of Appeal.—REP.

ALDRICH V. THE CANADA PERMANENT LOAN AND
SAVINGS CO.

Mortgage—Several Parcels—Sale Under Power, en bloc—Duty of Mortgagees—Damages.

The mortgagees, in a mortgage containing two parcels of land, a farm with buildings, and some village lots with stores thereon, about three quarters of a mile distant from the farm, sold the property *en bloc*, under the power of sale in the mortgage, for a much smaller sum, as shewn by the evidence, than would have been realized had the properties been sold separately:—

Held, that the mortgagees had not acted with that prudence and discretion which they were bound to do, and that they were liable to the mortgagors for the amount that might have been realized.

Decision of MACMAHON, J., reversed.

Statement. THIS was an action tried before MACMAHON, J., at the non-jury sittings at Sandwich, on April 16th, 1895.

The action was to recover damages alleged to have been sustained by the plaintiff by reason of the defendant company having, in exercise of the power of sale contained in a mortgage given by the plaintiff to the company, sold the several parcels of land contained therein *en bloc* instead of in separate parcels.

The lands were described in the mortgage as being two separate parcels: 1st. A part of the north part of lot No. 12, in the gore of the township of Colchester South, 100 feet x 38 feet, being in the village of Harrow, on which were erected two brick stores, used as a drug store and a general store, with dwelling and offices. These buildings and the land, the plaintiffs alleged were worth \$4,000. 2nd. The north forty acres of the east half of lot 14, on the second range of the gore of the township of Colchester South. Of this last-mentioned parcel, two acres were fenced off and a large and commodious brick residence was erected thereon, which cost \$4,000.

The remaining thirty-eight acres, with the buildings thereon, being a good frame two-storey farm-house, and good outbuildings and barn, were said to be worth \$3,000.

The first described parcel, in the village of Harrow, was three-quarters of a mile distant from the other parcel, and

belonged to the plaintiff Mary C. Quick, who joined in the mortgage, and mortgaged this property as further security to the defendant company, for the loan of her son Aldrich. Statement.

The complaint was, that by reason of the sale of the several properties in one block instead of in parcels, the property was sacrificed, and sold at a price much less than would have been obtained by a sale in parcels, and much under the value of the lands. And the plaintiffs complained that the sale of the lands in a block, instead of in parcels, was an unreasonable exercise of the power of sale contained in the mortgage, by reason whereof the plaintiffs suffered damage.

At the close of the evidence the learned Judge found the following facts in regard to what the several properties would have brought in two separate parcels: the farm of forty acres, with the brick house, as one parcel, and the "Harrow" property, the two brick stores, etc., as the other parcel.

As to the farm with the brick house	\$3,750
As to the two stores in Harrow	2,500

Making a total of	\$6,250
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The amount realized for the whole in one block was \$5,210.

On these facts being found, the learned Judge reserved judgment, and afterwards dismissed the plaintiffs' action with costs, for the following reasons:—

"A mortgagee with power of sale in exercising the power is bound to take all proper precautions to have the sale conducted so as to insure the greatest advantage to the mortgagor by properly advertising, etc., which was done by the mortgagees, in the present case. But the mortgagees were not bound to put up the mortgaged property in separate parcels: *Dart V. & P.*, 6th ed., pp. 75, 76; *Davey v. Durrant*, 1 DeG. & J. 535; *Harper v. Hayes*, 2DeG. F. & J. 542. Where as here a prudent owner might have sold in one lot, it is sufficient to protect him: *Richmond v. Evans*, 8 Gr. 508, 513; *Lewin on Trusts*, 8th ed., 437.

Statement. The plaintiffs moved to set aside the judgment entered in favour of the defendants and to have the judgment entered in their favour.

On December 10th, 1895, before a Divisional Court composed of FERGUSON, and ROBERTSON, JJ., *C. Macdonald*, supported the motion. The evidence of the defendants' own agent shews that the lots would have sold better had they been put up separately, and the assessor and auctioneer gave evidence to the same effect. The agent, however, said he was bound by his instructions. It also appeared that there were parties present at the sale who would have given a large price had the lots been put up separately, and the plaintiff is entitled to recover what he has lost by the lands having been sold *en bloc*. It must also be taken into consideration that the village lots were owned by the mother, and were only put in the mortgage as the mother had agreed to become security for the loan. In exercising the power of sale mortgagees are deemed to be trustees, and must exercise reasonable care and prudence to prevent the mortgaged property being sacrificed; and a failure to do so renders a mortgagee liable for the loss the mortgagor has sustained thereby: *Prentice v. Consolidated Bank*, 13 A. R. 69; *Latch v. Furlong*, 12 Gr. 303; *Hunter on Mortgage Sales*, 88-90. The authorities relied on by the learned Judge at the trial do not support the conclusion he arrived at. In *Dart on Vendors and Purchasers*, 6th ed., pp. 75, 76, all that is said is that a mortgagee may sell *en bloc*, but subject to be called to account therefor; and the other cases referred to by him proceeded on other grounds.

Walter Cassels, Q. C., and *George McKenzie*, contra. There is no case to be found where the mortgagee has been held liable for selling in one parcel. In *Latch v. Furlong*, 12 Gr. 303, the mortgagee stated that he intended to let the property go if he got the amount due him, and it was sold at a very great sacrifice. In *Prentice v. Consolidated Bank*, 13 A. R. 69, there was no advertise-

ment before the sale. In the *National Bank of Australasia v. United Hand in Hand Band of Hope Co.*, 4 App. Cas. 391, two properties were sold, as to one of which the mortgagees had no power of sale, and that was the point on which the case turned. The result of the authorities is that if a mortgagee exercises his power of sale *bond fide* for the purpose of realizing his debt and without collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud. The mortgagee in exercising his power of sale is not a trustee for the mortgagor except as to the balance of the purchase money: *Warner v. Jacob*, 23 Ch. D. 220; *Provincial Mutual Ins. Co. v. Lewis*, 67 L. T. N. S. 644, 646; *Adams v. Scott*, 7 W. R. 213. The defendants are not bound to put an upset price on each lot, and their evidence shewed that they would have run a very great risk and acted most foolishly had they done so; and one of the plaintiffs' witnesses gave evidence to the same effect.

April 10th, 1896. ROBERTSON, J.:—

With great respect, I cannot come to the same conclusion as the learned Judge at the trial. In my judgment, the facts presented in this case make it manifest on the authorities that the defendants the mortgagees, in exercising the power of sale, did not take the necessary precaution to do all that was reasonably necessary, to realize the most that could be gotten for the several parcels of land comprised in the mortgage. On the evidence, I do not think any prudent owner would have put up the two parcels in one block. It appears that the whole amount of the mortgagees' claim did not exceed \$4,700. The original loan was \$4,000. This was the amount which the plaintiff Aldrich was bound to pay, and which—his own land, viz., the farm of forty acres, including the brick house—was mortgaged to secure, his mother, the defendant Mrs. Quick, becoming surety, as the

Judgment. defendants well knew, for the repayment of the loan, and to secure which she allowed to be included in the mortgage, her own property, being the two brick stores in the village of Harrow, and joined in the covenant for payment. When one considers that important fact and the equally important fact that the two pieces of property—that of the defendant Aldrich and that of the defendant Quick—are situated a considerable distance (three-quarters of a mile) from each other, one can hardly imagine any excuse for the mortgagees pursuing the extraordinary course they did.

Robertson, J.

In the first place, the farm with the brick house, there being also a good two-storey frame house suitable for all reasonable farm purposes, together with a good barn and other outbuildings on the same, and on which was an orchard, the not unreasonable suggestion one would have thought, would have presented itself to the minds of the mortgagees, which was to put up the farm by itself with the brick house. Now the brick house alone cost \$4,000, and forty acres of good land in that part of the county of Essex, with the frame house, barn and other outbuildings, ought to be fairly worth to any *bond fide* purchaser \$50 per acre; so the farm without the brick house should reasonably have brought \$2,000—(James Ford, a witness who went to the sale to bid, swore he was prepared to give \$2,500). Then the brick house added, should have brought or should have reasonably been considered most likely to realize one-half its original cost; so that would be \$4,000 or \$4,500. Now, on the evidence, the learned trial Judge has found that \$3,750 was what it would have brought at the sale, overlooking the fact, however, that a witness, Bassett, swore that he had made up his mind to give \$4,100 for the farm and brick house, had it been put up by itself; there being other intending purchasers present who would have given that much for it, had it been put up separately. This being the case, the Harrow property belonging to the surety would have brought, as the learned Judge found, \$2,500. On the evidence, I think I would have found

that the latter would have brought more than \$2,500. Judgment. There were two brick stores, well situated in the centre of a thriving little village, occupied by respectable tenants, at a rent that was equal to 10 per cent. on \$3,000. Now, taking into consideration another fact in connection with the Harrow property, viz., that Mr. Allan, a private banker, had a second mortgage on it, is it not most probable that he would have bid over \$2,500, in order to save something out of his mortgage? I think it most reasonable to conclude that he would. He could have well afforded to have given as much as \$3,000; it would at that price be an investment at 10 per cent. Robertson, J.

Now, there was no risk whatever in putting up the farm and brick house first. \$4,000 was a reasonable sum to have considered it would have realized, and then the Harrow property could have been fallen back upon, to make good whatever the deficiency was.

With great respect for the opinion of the learned trial Judge, I think he erred when he confined himself to the statement: "A mortgagee with power of sale in exercising the power is bound to take all proper precautions to have the sale conducted so as to insure the greatest advantage to the mortgagor by properly advertising, etc., which was done by the mortgagees in the present case." "Properly advertising" is not enough; the sale must be conducted in such a way as to make the very most out of the property offered. The mortgagees are trustees, in the case of power of sale, etc., and are not like an ordinary vendor selling what is his own; he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor of any surplus that may remain: *Jenkins v. Jones*, 2 Giff. 99, 108.

A mortgagee is chargeable with the full value of the mortgaged property sold, if from want of due care and diligence it has been sold at an undervalue: *National Bank of Australia v. United Hand in Hand and Band of Hope Co.*, 4 App. Cas. 391.

It is the settled rule of equity that a mortgagee in ex-

Judgment. exercising a power of sale must take reasonable means of preventing a sacrifice of the property ; hence when a mortgagee took no means whatever for that purpose and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside : *Per Mowat, V.-C., in Lutch v. Furlong*, 12 Gr. 303.

A mortgagee has rights ; he has a beneficial interest, and that interest is the realizing of his security. In other words, getting paid his mortgage bearing interest and any costs he may incur. That is his right, but this Court will not allow him to exercise that right without a due consideration of the interest of the mortgagor, which the mortgagee, in my opinion, is bound to attend to, requires that the sale shall take place as beneficially to the mortgagor as if the mortgagor himself was selling the property : *Per Sir Richard Kindersley, in Falkner v. Equitable Reversionary Society*, 4 Drew. 352.

The attention of the mortgagees was brought to the desire of the plaintiffs, and the importance of putting up the property in at least two parcels, but they paid little or no attention to that. Their agent Russell evidently thought that it should in justice, be put up in that way, and he said he would if asked by the defendants so advise. Some communication must have taken place between him and his principals, because, when Aldrich's father-in-law called upon him the second time, with the view of ascertaining if his request would be complied with, Mr. Russell told him that if he paid \$800 down the property would be put up in two parcels. Now, to my mind, that shews a clear case against the defendants. They evidently did not care whether the property were sacrificed or not, so long as they realized their own. In my judgment, they should have made enquiry as to the advisability of having it put up in two parcels, before they ran the risk of sacrificing the property. The evidence is most conclusive as to which would have been the better course to pursue in the interest of the mortgagors, and I do not think there can be any question as to what the law is. I think the learned

Judge was in error when he concluded that the mortgagees were not bound to put up the property in two separate parcels. Of course there are cases where that may be justified, but not in a case like this. Here the properties were not only separated by distance, but were of different classes. The village property was not likely to be that kind of real estate which a farmer would care to buy; at all events, there would most certainly be fewer customers for the two parcels together than there would have been to take them separately, and that should have been patent to the mind of the vendors. And again, a purchaser of the village property would not likely be one who would want the farm, and these facts really turned out to be the case here. And what is a striking feature in the case is that there was a sort of syndicate of two persons formed to buy *en bloc*, between whom it was arranged that one would take the farm at \$4,100, and the other take the village block at \$1,500, thus shewing that between them they were prepared to bid much more than they ultimately bought at, the fact being that these two people did buy. Harry Bassett and Mr. Fox were the two, and the former says in his evidence: "There was an agreement to buy it (the whole) between us; he was to take the block (the village property) and I was to take the farm. He was to do the bidding, and I was to pay a certain share of it. * * It finally (*i.e.*, the arrangement between Fox and Bassett) got down to the morning of the sale, and I agreed that I would give \$4,100, and he would give \$1,500, and whatever profit he sold for was to be divided on that ratio. He wanted the block and did not want the farm. I wanted the farm and did not want the block. * * The property (the whole) was knocked down at \$5,210. I paid my share, \$3,900." Now this shews conclusively that had the farm been put up by itself Mr. Bassett would have paid \$4,100 for it rather than lose it. He had arranged to go that high for it; so here was a loss of \$200 on the farm and a loss of \$190 on the village block—at the prices which Bassett and Fox had determined to buy at.

Judgment. Now come to the village block, and we find that Mr. Fox would have bid \$1,500 for it; but Darius Wigle, another witness, says that he went to the sale for the purpose of bidding and, if possible, buying either the farm or the village block, but he could not handle both, and he said he would have bid for the block from \$2,000 to \$2,500; and another witness also at the sale, Elihu Scratch, swore that he was prepared to bid \$2,500 for the brick block (the village property), but he would not buy both together. It therefore appears clear, had the parcels been put up separately, that the farm would have realized \$4,100 and the village block \$2,500, making in all \$6,600, shewing a loss of \$1,390 at least on what was actually realized. There was in fact only one *bond fide* bidder at the sale. Allen set it off at \$5,000. Then Allen's clerk (Adams) made a bid, and Allen then bid \$5,200, and, after a consultation with Fox, the latter bid \$5,210, and it was knocked down to him. Now, had the properties been put up separately, this sort of work could not have been so conveniently practiced.

The power of sale is in these words: "And should default continue for two months, an entry, lease or sale may be made hereunder without notice. It is agreed that the proceeds of any sale hereunder may be applied in payment of any costs, charges and expenses incurred in taking, recovering, or keeping possession of the said lands, or by reason of non-payment, or procuring payment of moneys secured hereby. And that sales may be made from time to time of portions of said lands, or of the equity of redemption in the whole of said lands, subject to the amount not yet actually payable according to the proviso, to satisfy interest or parts of the principal overdue, leaving the principal or balance thereof to run at interest payable as aforesaid, and the company may make any stipulations as to title, evidence, or commencement of title, or otherwise which they shall deem proper; and may buy in, or rescind, or vary any contract for sale of any of the said lands, and re-sell without being answerable for loss occasioned thereby. And that the purchaser at any sale hereunder shall not be

bound to see to the propriety or regularity thereof. And ^{Judgment.} that no want of notice or publication when required here-^{Robertson, J.} by shall invalidate any sale hereunder."

There is nothing in this that enables the mortgagees to override the rules enforced by the Court, in cases of sale by trustees or mortgagees under powers. They cannot find anything in this power that gives them the right to sacrifice the mortgaged property in the way in which they have done in this case. Every witness called, including the agent of the vendors, declares that in their opinion the proper way to have sold in this case, was to have put up the property in two separate lots, and the proof of that being the better way, is in the fact of what the persons who attended at the sale intended to bid, if thus put up, whereas they made no bid whatever, when it was put up *en bloc*, and Messrs. Bassett and Fox had it at their own price, much less than they were prepared to have given for it rather than lose it.

It must be remembered that every reasonable effort was made, if that was necessary, which I do not think it was, to induce the vendors to put the property up in separate lots; and that having failed, I think it does not lie in the mouth of the vendors to say, as their counsel did, that none of these people protested at the sale against its being put up *en bloc*. As some of them said, "What was the use? We had done all we could before, and the inspector of the company was present and said the whole must go together."

I think the judgment of the learned Judge should be set aside and judgment be entered for the plaintiffs for \$1,300, with full costs of the action and of this motion.

FERGUSON, J. :—

The facts of the case, so far as material here, seem to be fully and clearly stated in the judgment of my brother Robertson, which I have had an opportunity of perusing.

From the evidence it appears clearly, I think, that the mortgaged property, had it been sold in two separate par-

Judgment.
Ferguson, J.

cels, instead of *en bloc*, as it was sold, would have brought a price in excess of that which it did bring of at least \$1,300. One can hardly doubt, from what is disclosed by the evidence, that the proper and prudent way of selling the property was by selling it in separate parcels.

The evidence, I think, makes it sufficiently manifest that the defendants had they made inquiries would have ascertained that a sale in separate parcels was, looking towards the interests of the mortgagors, the prudent and proper way of selling the property. If the defendants had made inquiry of their own local agent he would, as he says in his evidence, have recommended a sale in separate parcels. The situation of the two properties with relation to one another and their uses would indicate to me, and I think it should to the ordinary mind, that inquiry, at least, should have been made before selling the property *en bloc*, and, if such inquiry had been made, one cannot doubt, on the evidence, what the information received would have been.

The duty of a mortgagee in selling under his power of sale is stated in *Jenkins v. Jones*, 2 Giff. 99, at p. 108, and referred to in *Prentice v. Consolidated Bank*, 13 A. R. 69, at p. 77, where it is said: "It is well settled that though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it is given. A mortgagee with a power of sale stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor of any surplus that may remain."

In *Fisher on Mortgages*, 4th ed., sec. 748, it is laid down: "The sale must also be effected with proper discretion; for the mortgagee," as a trustee for persons interested in the equity of redemption, "is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had."

I agree with my brother Robertson in thinking that in the present case the evidence shews that the mortgagees

did not act in accordance with these requirements, and Judgment.
that a consequent loss of some \$1,300 has been shewn. Ferguson, J.

I think the plaintiffs should have judgment against the defendants for the sum of \$1,300, with costs of the action. The judgment of the trial Judge should be reversed and judgment entered as above.

G. F. H.

RE CANADIAN PACIFIC RAILWAY COMPANY AND COUNTY AND TOWNSHIP OF YORK.

*Constitutional Law—Railways—Crossings—Railway Act of Canada, 1888
—Powers of Railway Committee of Privy Council—Erection and
Maintenance of Gates—Contribution to Cost of—Municipal Corpora-
tions.*

The legislation of the Parliament of Canada with reference to the guarding of the crossings of a railway, which under sub-section 10 of section 92 of the British North America Act is under the exclusive legislative authority of Parliament, is within the scope of necessary legislation.

Under sections 11, 18, 21, 187, and 188 of the Railway Act of 1888, Parliament conferred upon the Railway Committee the power to order that gates and watchmen should be provided and maintained by such a railway at crossings of highways traversing different adjacent municipalities; to decide which municipalities are interested in the crossings; to fix the proportion of the cost to be borne by the different municipalities; to vary any order made by adding other municipalities as interested, and to re-adjust the proportion of the cost; and the decision of the committee cannot be reviewed by the Court.

Municipalities are subject to such legislation and the orders of the committee in the same way as private individuals.

SPECIAL case stated by the parties, shewing:—

Statement.

1. That the county and township of York were municipalities incorporated under the Municipal Act of Ontario.

3. That the line of the Canadian Pacific Railway ran along part of the north limit of the city of Toronto, the south limit of the railway lands being a part of the north limit of the city.

4. That Dufferin and Bathurst streets ran from south to north through the city across the railway lands, and thence through the township of York and the adjacent townships of the county of York, and were public roads

Statement. or highways under the jurisdiction of and maintained by the different local municipalities through which they passed, and not roads assumed or maintained by the county.

5. That on the 8th January, 1891, the Railway Committee of the Privy Council of Canada, upon the application of the corporation of the city of Toronto, made an order for protection of the crossings at Bathurst and Dufferin and other streets as follows :—

“ That the committee deems it expedient for the public safety and hereby orders, with the sanction of His Excellency the Governor-General in Council, that gates and watchmen be provided within two months of the date of this order, and be thereafter maintained by the Canadian Pacific and Grand Trunk Railway Companies, respectively, as the case may require, at the said crossings.

“ That the committee further orders that the cost attending the placing and maintenance of gates and watchmen at the said crossings be apportioned as follows :—

“ Where two railway companies use the same crossing, each railway company to contribute one-third, and the municipality or municipalities interested the other third, of the said cost.

“ Where one railway company only uses the crossing, the railway company to contribute one-half, and the municipality or municipalities interested the other half, of the said cost.”

6. That on the 16th December, 1893, upon the representation of the corporation of the city of Toronto (the county and township being represented by counsel who appeared without waiving their objection to the jurisdiction of the committee to make any order as against the county or township in the premises), a further order was made by the railway committee as follows :—

“ Whereas, by an order of the Railway Committee of the Privy Council dated the 8th January, 1891, it was directed that the municipality or municipalities interested should bear one-half of the cost of the placing and main-

tenance of watchmen and gates, thereby ordered to be provided by the Canadian Pacific Railway Company, at the crossings by their railway of Dufferin and Bathurst streets in the city of Toronto :—

“ And whereas the city of Toronto have represented that the township of York are equally interested with themselves in having protection provided at those crossings, and have requested that the said township be named as contributors to the cost thereof :—

“ And whereas the township of York have claimed that the county of York, and not the township of York, if any municipality besides the city is liable therefor, should bear a share of the said cost :—

“ And the city of Toronto and the township and county of York having severally been heard, through their respective counsel, and evidence having been adduced :—

“ The committee, after due consideration, is of opinion that both the township and county of York, as well as the city of Toronto, are interested in the said protection, and should pay a proportionate amount of the cost of the same, and the committee accordingly hereby apportion and orders the said cost to be paid as follows :—

“ The city of Toronto to pay two-thirds of one-half of the cost of the said protection.

“ The township and county of York to pay the remaining one-third of one-half of the cost of the said protection, in equal proportions.

“ The amount of the said cost, so apportioned, to be paid quarterly by the city of Toronto and township and county of York, respectively, to the Canadian Pacific Railway Company, on accounts being rendered to them by that company, and the said proportions of said cost to be payable from the date of the furnishing of such protection by the said company.”

The railway company, however, claimed contribution from the township and county only from the date of the second order, the city having borne the whole half of the cost up to that date.

Statement.

Statement.

7. That, in pursuance of the last order, the railway company had from time to time rendered to the county and township accounts of the cost of maintaining the protection mentioned, which accounts from the date of the order up to the 29th February, 1896, each amounted to \$317.81, and both of these municipalities had refused and still refused to pay any portion of such accounts, and the whole amount thereof, viz., \$635.62, was still unpaid.

The question stated for the determination of the Court was: Had the Railway Committee of the Privy Council any jurisdiction to make the orders complained of as against the township and county of York, or either of them?

It was agreed that if the answer to the question should be in the affirmative, as to the township or county or both, then an order for payment of the amount due and future amounts and costs should be made by the Court accordingly; but if the answer should be in the negative, then the railway company should be ordered to pay the costs, and there should be no order as to payment.

The orders of the committee had been made a rule of Court at the instance of the railway company, and their enforcement being sought, this case was agreed upon by the parties.

The following sections of the Dominion Railway Act of 1888 are those under which the committee purported to act in making the orders in question:—

187. Whenever any portion of a railway is constructed, or authorized or proposed to be constructed upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or, in the case of railways already constructed, within such time as the Railway Committee directs, shall submit a plan and profile of such portion of railway for the approval of the Railway Committee; and the Railway Committee,

if it appears to it expedient or necessary for the public Statement. safety, may, from time to time, with the sanction of the Governor in Council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection,—or to carry such street or highway either over or under the said railway by means of a bridge or arch, instead of crossing the same at rail level,—or to divert such street or highway, either temporarily or permanently,—or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger arising from the then position of the railway: and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee under this section.

188. The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable.

The case was heard before ROSE, J., in Court, on the 23rd April, 1896.

Aylesworth, Q. C., for the township of York. The committee has no power to impose obligations on unwilling persons who are not applicants before the committee for any relief. Sections 187-189 of the Railway Act of 1888 can be within the jurisdiction of the Dominion Parliament only in view of their falling within the exceptions contained in clause 10 of sec. 92 of the British North America Act. In that view, while there would be power to order the railway company to construct gates at cross-

Argument. ings, and to impose the obligation of maintaining them upon the company, there would be no power to impose any obligation upon the municipality. If the Dominion Parliament has power to legislate at all as regards "persons interested," such power must be limited to the applicants before the committee. The county and township are not interested in the first order. They were not before the committee when it was made. The second order apportions the cost among the municipalities; that is, it settles a dispute between local, provincial municipalities, as to which there can be no jurisdiction in the Dominion Parliament. A municipal corporation is the creation of the Provincial Legislature, and the Dominion Parliament can have no possible jurisdiction over it. There was, therefore, excessive jurisdiction, and "the second order cannot be enforced by the Court. The obligation imposed upon the municipalities is practically the imposition of a tax for behoof of the railway company: *Re Harris and City of Hamilton*, 44 U. C. R. 641: and this the Dominion Parliament can have no power to do. The assent of the Province would be necessary, in addition to the assent of the Railway Committee: *Credit Valley R. W. Co. v. Great Western R. W. Co.*, 25 Gr. 507. In sec. 188 "persons interested" are mentioned, but not municipal corporations.

C. C. Robinson and *T. H. Lennox*, for the county of York. We adopt the argument of counsel for the township as far as it goes; but we go further. The county at any rate cannot possibly come within the scope of the committee's authority. These streets are not county roads. How can the county be a "person interested?" The county can have nothing whatever to do with the matter, and the second order is clearly *ultra vires* as to it.

Robinson, Q. C., for the railway company. The Court has no power to review the decision of the Railway Committee, assuming that Parliament had the right to create it: *Ottawa, Arnprior, and Parry Sound R. W. Co. v. Atlantic*

and *North-West R. W. Co.*,* not reported; *Re Bell Telephone Co. and Minister of Agriculture*, 7 O. R. 605; *Re Bell Telephone Co.*, 9 O. R. 339; *Smith v. Goldie*, 9 S. C. R. 46. Then as to the power to enact the legislation in question. I admit the encroachment on property and civil rights. It must be so where a railway goes through a country: *McArthur v. Northern Pacific Junction R. W. Co.*, 17 A. R. 86; *Monkhouse v. Grand Trunk R. W. Co.*, 8 A. R. 637; *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316. The orders came within the powers conferred by sec. 11 of the Railway Act. The jurisdiction of the Railway Committee never has been disputed; the legislation comes to us, not from England, but from Massachusetts. As to jurisdiction of the Dominion to exempt railways from municipal taxation, see *Rural Municipality of Cornwallis v. Canadian Pacific R. W. Co.*, 19 S. C. R. 702. See also *Doyle v. Bell*, 11 A. R. 326.

Angus MacMurchy, on the same side, referred to *Regina v. Wason*, 17 A. R. 221; Pomeroy on Constitutional Law, p. 171.

J. R. Cartwright, Q. C., for the Attorney-General for Ontario. The Province might claim to exercise these powers as relating either to property and civil rights or to municipal institutions; or it may be overborne by sub-sec. 10 of sec. 92. But is it necessary for the purposes of the railway that gates should be put up and municipalities called on to pay? I submit not. The power to impose an obligation of this kind was never heard of till now, here or in England. If it is a necessary power, it is strange that railways got on without it for many years. The strongest case on the power to overbear

*A decision of the Chancery Divisional Court, 13th October, 1894. The judgment of the Court was delivered by FERGUSON, J., who said, *inter alia*: The case may, I think, be fairly looked upon as a case in which two railway companies in making their surveys came into conflict with their lines, each acting in accordance with their legal rights. * * I think the plaintiffs acted hastily in bringing this action. If the defendants had been taking possession of a line of which they, the plaintiffs, had possession, the matter would be different, and I think the action for an injunction would lie. I do not see that the action can be supported as an action *quia timet*. I do not see that the plaintiffs had anything to

Argument. Provincial rights is *Tennant v. Union Bank*, [1894] A. C. 31. There it is said that the legislation must strictly relate to the subject of Dominion jurisdiction. That is not so here. The most that can be said about this is that it relieves the railway from the excess. I admit that anything strictly necessary must be *intra vires* the Dominion Parliament. But this is not necessary. Would it be contended that the Dominion Parliament can confer power on a railway company to set up a toll-gate at a crossing and levy toll on all persons using the crossing? I refer to *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96, and *Colonial B. & L. Association v. Attorney-General*, 9 App. Cas. 157, where the Privy Council recognizes that Dominion corporations may require Provincial legislation to enable them to do business at all.

No one appeared for the Attorney-General for Canada.

April 29, 1896. ROSE, J.—(after stating the facts):—

The railway in question is one within the exception in sub-sec. 10 of sec. 92 of the British North America Act, and, therefore, not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of Provinces, it is within the classes of subjects to which the exclusive legislative authority of the Parliament of Canada extends.

Mr. Cartwright, who appeared for the Province of Onta-

far from the conduct of the defendants for which a sufficient and ample remedy does not exist, and it does not appear, I think, that there was danger of irreparable mischief taking place, or any right being lost. There being specific legislation on the subject, and a special tribunal constituted having powers and jurisdiction respecting the crossings of tracks of railways, the intersection of railways, and proposed junctions or unions of the same, as well as the alignment, arrangement, disposition, and location of tracks, the use by one company of the tracks of another company, and every matter, act, or thing which by the Railway Act or the special Act of any railway company is sanctioned, required to be done, or prohibited, I cannot see that it is a proper case in which to ask this Court for a declaration, and I am of the opinion that it would not be a proper thing for the Court to declare generally the rights or priorities of the parties, and I think that the action should be dismissed.

rio, admitted that the legislation in question, if necessary, was undoubtedly *intra vires* the Parliament of Canada.

Judgment

Rose, J.

I do not see how it can be doubted that it was necessary to make some provision for the protection of the public at the crossings in question. It is certainly not so manifestly unnecessary as to raise any question as to the jurisdiction of the Parliament of Canada to legislate respecting it, even if it is within the province of the Court to inquire into any such question of necessity.

But Mr. Cartwright urged that, although it might be necessary to provide safe-guards at such crossings, it was not necessary to order the persons interested, other than the railway company, to pay the cost thereof. I cannot accede to that argument. If more than one person is interested in the placing of gates or other safe-guards at the crossings, it seems to me clearly within the scope of the authority of Parliament to determine by and between whom the cost should be apportioned, and by whom it should be paid.

It will be desirable to see what powers Parliament conferred upon the Railway Committee, so as to determine whether or not the order in question was within such powers.

By sec. 11 of the Railway Act, 1888, the railway committee was empowered to inquire into, hear, and determine any application, complaint, or dispute respecting, among other things, "(i). The proportion in which the cost of fencing the approaches to crossings on railways constructed or under construction on the 19th of April, 1884, shall be borne by the company and the municipality or person interested : (j). The compensation to be made to any person or company in respect to any work or measure directed to be made or taken, or the cost thereof, or the proportion of such cost to be borne by any person or company."

Sections 187, 188, and 189 give further powers. Section 188 is as follows: "The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and of any such measures of protec-

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Rose, J.

tion, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable."

It seems to me beyond question that the Parliament of Canada intended to confer, and did in terms confer, upon the Railway Committee the power to make such orders as those before me, unless the fact that the orders are made against municipal corporations makes any difference.

Mr. Robinson, Q. C., argued that these gates were "fencing the approaches to crossings on railways," within the meaning of sub-sec. (i). I do not think it is necessary to determine that question, for, apart from the provisions of sec. 188, it seems to me that the latter portion of sub-sec. (j) of sec. 11 is sufficiently broad to cover the case. I read that as empowering the Railway Committee to inquire into, hear, and determine any application, complaint, or dispute respecting the cost of any work or measure directed to be made or taken or the proportion of such cost to be borne by any person or company.

If, therefore, the legislation respecting this railway is within the exclusive legislative authority of the Parliament of Canada, if the guarding of dangerous crossings is within the scope of legislation respecting railways if the apportioning such cost between the parties interested is something proper to be provided for, and if Parliament had the power to confer jurisdiction upon the Railway Committee (which was not denied), then it seems to me clear that, under the sections to which I have referred, the Railway Committee had the power to make the orders referred to, subject to the question of the persons declared interested with the railway in the maintenance of such safeguards being municipal corporations.

Mr. Aylesworth, for the township, as I understood him, admitted that if this order had been directed against a person who owned a crossing which it was necessary to guard, it would have been *intra vires*, but disputed the liability of a municipal corporation.

Mr. C. C. Robinson pressed the argument farther, and submitted that even if the city of Toronto and the town-

ship of York could well have been ordered to bear a proportion of the cost, it was manifest that the county of York could not, because it did not own the roads, and could not in any sense be deemed a person interested.

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Rose, J.

It must be borne in mind that when the Parliament of Canada is legislating respecting any subject within its exclusive legislative authority, its jurisdiction and powers cannot be affected, limited, or controlled by any Provincial legislation; it deals with the Dominion as a whole, irrespective of any territorial divisions, municipal or otherwise. Therefore, if a Provincial Legislature sees fit to create a municipal corporation and to vest in such corporation highways or lands, such legislation manifestly cannot prevent the Parliament of Canada from dealing with such lands so vested in such corporation, and the corporation in which they are vested, in the same way and manner as if such lands had been in the hands of private citizens.

No authority was cited for the proposition contended for that a municipal corporation stood in any respect in any different position from that of a private individual, and I am unable to see that it does.

I have not any power to review the decisions of the Railway Committee. By sec. 21 of the Railway Act it is declared that, "subject to the provisions of sec. 18, every decision and order of the Railway Committee shall be final." Section 18 provides: "The Railway Committee may review and rescind or vary any decision or order previously made by it." I, therefore, am not empowered to inquire into the evidence or the grounds upon which the committee decided that the county of York was a person interested in the maintenance of these gates. I cannot tell upon what ground the committee proceeded, and it is sufficient to say it is not impossible that the county was and is a person interested in the maintenance of such gates. The decision respecting that by the Railway Committee is final, subject only to any rescission, change, or variation of such order either by the committee itself or by the Governor in Council, upon petition as provided by sec. 21.

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Rose, J.

But it was further contended that this was not a matter of apportioning cost, but simply the determining of a dispute between two municipalities, and therefore clearly *ultra vires* the Railway Committee.

A reading of the orders does not lend support to such contention. The first order is indefinite in its language, but broad enough in its terms to cover all the municipalities interested; and the second order simply determines specifically which were the municipalities interested, and even if the second order is in any sense a rescission or variation upon review of the first order, it was within the powers of the committee conferred upon it by sec. 18.

I am, therefore, of opinion that the British North America Act conferred upon the Parliament of Canada the exclusive legislative authority to deal with this railway and with the guarding of the crossings; that legislation upon such a subject was necessary legislation; that the Parliament could and did confer upon the Railway Committee of the Privy Council the power to make such orders as those in question; that it was within the power of the committee to determine what persons were interested in the crossings; that the Court has no power to review such decision, it being declared to be final; and that the fact that the highways in question were vested in municipalities, or in any sense controlled by them, did not in anywise limit the powers of Parliament to legislate respecting the subject, or of the Railway Committee to make the orders in question, but that the municipal corporations were subject to such legislation and to the orders made thereunder as any private individual would be.

The question, therefore, is answered in the affirmative, and an order may issue in the terms provided by the special case.

Of course, if an order of the committee were manifestly *ultra vires*, the Court, notwithstanding the want of power to review the findings of the committee, should and would refuse to make any order to assist or enforce such *ultra vires* order; but here it seems proper to grant the order as agreed upon.

E. B. B.

BAVIN V. BAVIN.

Alimony—Cruelty—Condonation of—Subsequent Misconduct.

The condonation by a wife of acts of cruelty and ill-treatment by the husband which would justify her leaving him and claiming alimony, is conditional on the non-recurrence of such misconduct, and is removed by subsequent ill-treatment and threats after such condonation.

Legal cruelty considered and defined.

Decision of MEREDITH, J., at the trial reversed.

THIS was an action to recover alimony, tried before Statement.
MEREDITH, J., at Chatham, on September 11th, 1895, when, on motion for nonsuit at the close of the plaintiff's case, he delivered the following judgment, dismissing the plaintiff's action :—

MEREDITH, J., after referring at length to the evidence during the argument, said :—

Notwithstanding the very improper, the very harsh, the extremely wrong conduct, of the defendant, as shewn by the testimony as far as it has gone, I am of the opinion that the plaintiff has not made out a case entitling her to the relief which she here seeks. If she had shewn any act of cruelty subsequent to that act of two years ago, which she conditionally forgave, the case would be very different. If she had shewn that this improper, frequently recurring, disgraceful conduct on the part of her husband had the effect of putting in jeopardy her life or injuring her health, a different case would have been made out. *As it is, I am unable to say that the terms upon which she agreed to remain have been broken.* I do not think that there was any charge of unfaithfulness in what took place on the occasion related by Mrs. Clayton and the plaintiff. If I did, I fear there would be many wives in that class of society of whom it could be said that they had at some time or other been so accused. It was a hasty, wrong, and I think I may say, blackguard-like thing to say, but I do not think there was any intention to accuse the woman seriously of

Judgment. having been unfaithful in what was said on that occasion.
Meredith, J. I cannot give full effect to all that the plaintiff has said, allowance must be made for some exaggeration of statement. She seems to now regret her condonation and to strive, without sufficient foundation in fact, to get rid of its effect. And the husband seemed to know enough to stop short of any matrimonial offence; to avoid breaking the express or the implied condition under which former offences were forgiven. Upon the defendant undertaking to receive his wife and to treat her as he ought to do, this action should be dismissed, but the plaintiff should have all the costs that the law will allow me to give to her; the limit is fixed by the Consolidated Rule 1186.

The plaintiff moved on notice to set aside the judgment entered for the defendant and to have the judgment entered in her favour.

On December 11th, 1895, before a Divisional Court composed of FERGUSON, and ROBERTSON, JJ., *W. M. Douglas*, and *E. W. Scane*, supported the motion.

Warren, contra.

April 10, 1896. ROBERTSON, J. :—

The facts, as I make them out from the evidence, are as follows :—

The defendant is a farmer residing in the township of Raleigh, and is tolerably well off. He and plaintiff were married in January, 1863, and lived together until the last day of May, 1895, excepting five days when she was obliged to leave his house and go to a married daughter's. Her absence of five days took place twelve years ago, when she left him for gross cruelty, etc. There were nine children of the marriage. The plaintiff swears that she left him on the last occasion because she was afraid he would take her life, and her reasons for so being afraid were because of his violent temper, "his drinking very hard,"

and having a revolver on his person for three or four years past. The immediate cause of her leaving was his quarrelsomeness, abusiveness to her and the children, and "for calling her the worst names a woman could be called." He called her a d——d bitch and a whore, and accused her of being unfaithful to him, and beat her several times, and he threatened, if he ever laid hands on her again, he would make her, so she would not be able to take the law of him. This last threat was made within two years, and since he had beaten her on the occasion two years ago, when she was obliged to leave him. On that occasion he beat her over the head until she could not see and became insensible. She was not able to work after that beating for a month or more; he beat her with his fists and hands; caught her by the hair of the head and pounded her head against a pantry door. She got away to a neighbour's where she remained for some time, but after, on his solicitation, and on account of her children, returned to him, but told him if he ever beat her again she would take legal proceedings. Since then he has been quarrelsome and abusive to her, and the children at home, and would not allow her to visit her married children, and threatened, if she did, he would dash her brains out. At the time of the leaving by plaintiff the last time, the whole of the family had gone away, either by being married or driven from home by the defendant, the last two being a daughter and a son. The former he had put away a year ago the previous Christmas, and the latter a day or two before the plaintiff left. The boy, who was in his fifteenth year, had been told by defendant to go, and he gave him \$5 to go with, and he told him never to come back, etc. The boy went to his married sister's, and this annoyed the defendant and he took a constable with him and brought the boy back, but in consequence of the violence of the defendant the boy ran away the next morning. When defendant discovered this, he went to the plaintiff, in a terrible rage and told her, he would have the boy back if it should cost him his last dollar, and he said "now it will be life for

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Robertson, J.

Judgment. life." She did not know whether he meant to take her
Robertson, J. life or the boy's, but she supposed he had his revolver on his person then, as it was not under his pillow where he kept it when he had it not in his pocket. Defendant then insisted upon plaintiff going with him to their daughter's, where the boy was, as he said he knew she could fetch him back. She consented and went with him to her daughter's, where the boy was, but she could not induce the lad to return home, and then, owing to defendant's previous threats, and the hatred which he had for her, and believing that he had the revolver on his person, she was afraid to return home with him and remained at her daughter's, and that was the occasion of their parting. It also appeared that before the assault of two years ago, he had on the Christmas before struck her on the head, with a teapot full of boiling water. On a still former occasion she was obliged to have him bound over to keep the peace. There had been numerous assaults, both before and since the more violent one, two years previous, which she had condoned. It appeared also that defendant had refused to allow plaintiff to have a medical man when she was ill, and also refused to procure medicines for her, and this continued for two years back up to the time she left. The plaintiff said to the learned trial Judge "I cannot go back to him because I am afraid he will take my life, on account of his drinking and bad temper and abusing me, and the hatred he has for me." When he was in a rage, which was of frequent occurrence, when anything would go wrong out of doors, or with the children, he would come in and abuse the plaintiff.

This state of things was corroborated by several witnesses, and one, a respectable neighbour's wife, Mrs. Clayton, said that she had more than once heard defendant call plaintiff a whore, and a short time before and on the day she left he insinuated that the boy John was not his. This was in other persons' presence; and she also heard defendant on that occasion, when they were at the dinner table, the boy John being the subject on which he was

talking, say to his wife: "Well, I am determined to have John; there is just one thing more to do, you will have to go with me to Russell's; I think you can get him; I will take you there this afternoon, and if you can get him, well; if you cannot, why then I will go straight to Blenheim and you can come home the best way you can. I have determined to have him. Now it is life for life." This witness also says: "Defendant was talking about John and said: 'I will get him unless you swear the child is not mine; perhaps you will.'" Plaintiff took this up and said: "Bavin you have told me that too often; what would you say if I go too?" And he replied: "You can go if you like for all I care." The defendant spoke in anger as if he meant it.

There were other facts and circumstances which came out in evidence which shewed that the plaintiff was living in dread of bodily hurt, from day to day, for years before she left defendant, and the question seems now to have resolved itself into whether the subsequent ill-treatment of plaintiff by defendant was sufficient to remove the condonation of previous acts of cruelty, and whether such acts were sufficient to warrant plaintiff in having a reasonable apprehension of bodily hurt at the time she concluded not to return to his house.

"All condonations by operation of law are expressly or impliedly conditional; for the effect is taken off by repetition of misconduct. Condonation is not an absolute and unconditional forgiveness": *per* Lord Stowell in *D'Aguilar v. D'Aguilar*, 1 Hagg. 773, 781.

"Whatever may be the cause or motive of the husband's misconduct, the wife is entitled to the protection of the Court, if cohabitation is rendered unsafe, unless she is herself greatly to blame": *Curtis v. Curtis*, 1 Sw. & T. 192.

In *Evans v. Evans*, 1 Consist. R. 35, Lord Stowell says, as to what is cruelty, at p. 37: "The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duty can be discharged; for the

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Robertson, J.

Judgment. duty of self-preservation must take place before the duties of marriage." And at p. 40, proof must be "given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait until the hurt is done; but the apprehension must be reasonable: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind."

Robertson, J.

There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent of injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case. So likewise what may aggravate the character of ill-treatment, must be deduced from various considerations—in some degree from the station of the parties—in some degree from the condition of the person suffering at the time of the infliction. * * Feelings which naturally belong to a wife or mother of every station, constitute a part of the consideration": *per* the Dean of Arches in *Westmeath v. Westmeath*, 2 Hagg. (Sup.) 72.

In *Wilson v. Wilson*, 6 Moore P. C. 484, husband and wife separated by mutual consent, in consequence of the conduct of the husband towards the wife, which, in itself, amounted to legal cruelty. The wife afterwards sued in the Arches Court for restitution of conjugal rights, and by virtue of a decree of that Court the parties again cohabited, when the husband renewed his acts of cruelty towards the wife, who continued to cohabit with him notwithstanding, for six months. Upon a suit brought by the wife for divorce by reason of cruelty, such divorce was decreed, the Judicial Committee, in affirming the sentence of the Arches Court, holding that the former cruelty was revived by the subsequent acts, and was not condoned by the cohabitation enjoined by the sentence of restitution of conjugal rights. Lord Brougham, in his judgment at page 488, says: "It is a question whether the language itself, used by him towards his wife, although not sufficient to amount to menace, does not constitute legal cruelty, because what had passed before gave a character to such

language and conduct, and we have only to consider what Judgment. must be the effect of the language used, accompanied by Robertson, J. gestures, on a person acquainted with her husband's previous conduct, which was infinitely worse even than that at present complained of. Taking all circumstances into consideration, we think that the renewal of cohabitation was not a condonation of the former cruelty."

In *Graham v. Graham*, 5 Court of Session Cases (4th Series) 1093, the pursuer of an action of separation and aliment on the ground of cruelty, had some years previously left her husband's house and raised a similar action against him. She did not proceed with that action, and returned to her husband's house. Held, that she was not precluded by the reconciliation from proving acts of violence previous to that date. The issue in an action of separation is whether the wife has such reasonable ground for apprehension of violence as to make it advisable that she should not be forced to go back to her husband.

In *McKeever v. McKeever*, 11 Ir. R. (Eq.) 26, it was held that a return to cohabitation is a condonation of past cruelty, but past cruelty condoned is subject to be revived by subsequent misconduct of the husband, such as acts of violence and threats calculated to revive a sense of insecurity and apprehension of danger.

A persistent course of harsh, irritating conduct, unaccompanied by actual violence, but carried to such a point as to endanger the health of the plaintiff and renewed after the resumption of interrupted cohabitation, held to constitute legal cruelty. In this case the petitioner stated that the cruelty, which commenced during the honeymoon, consisted of harsh and irritating language and tyrannical conduct, which made her life intolerable and seriously injured her health. There was no actual violence, but he had shaken his fist in her face, saying at the same time that being a lawyer he knew the law too well to commit "actual violence."

In *Mytton v. Mytton*, 11 P. D. 141, Butt, J., in his judgment says, at p. 142: "In order to entitle me to

Judgment. decree that which is asked by the petitioner, I must be
Robertson, J. satisfied of two things : first, that there was what the law recognizes as cruelty perpetrated by the husband upon the wife ; and, secondly, assuming such cruelty to have existed and been committed in the year 1880, inasmuch as the parties lived together for several years after that, there must be such further act of violence as to prevent the husband setting up condonation from subsequent cohabitation. * * According to the authorities, it is not necessary that the subsequent acts of cruelty should be exactly of the same extent as those which have been committed on the earlier occasions."

Dr. Lushington, in *Bramwell v. Bramwell*, 3 Hagg. 616, at p. 635, speaking of the evidence of cruelty in the case, says: "Undoubtedly, the evidence of the cruelty is not so satisfactory as it might have been ; but if the witnesses lay a sufficient ground for the Court to conclude that the wife's return to cohabitation would be attended with a reasonable apprehension, or a probable danger, of personal violence, the Court will release her from the duty of such return."

In *Russell v. Russell*, [1895] P. 315, at p. 322, Lopes and Lindley, LJJ., define legal cruelty thus: "There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty." The same learned Judges, in considering what, in the view of the Ecclesiastical Courts, constituted legal cruelty for which a divorce *a mensa et thoro* could be obtained, referred to the leading case of *Evans v. Evans*, already referred to by me, and they say: "As we read that case, no husband could be found guilty of legal cruelty towards his wife, unless he had either inflicted bodily injury upon her, or had so conducted himself towards her as to cause actual injury to her mental or bodily health, or as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her, or cause actual injury, to her mental or bodily health."

Stroud in his Judicial Dictionary, at page 146, defines

"condonation" as follows: It "is a conclusion of fact, not Judgment. of law; and means the complete forgiveness and blotting out of a conjugal offence, followed by cohabitation,—the whole being done with the full knowledge of all the circumstances of the offence forgiven." And he cites cases in support of that, among them *Rose v. Rose*, 8 P. & D. 98, where Jessel, M. R., said: "I think that the notion of bygones being bygones is as important between husband and wife as between any other persons." And he scouted what he called 'the old monkish doctrine' of condonation being conditional on future fidelity; but almost, simultaneously, the President of the Probate Divorce and Admiralty Division laid it down that 'the legal definition of condonation is forgiveness upon condition that no matrimonial offence shall be committed in the future': *Blandford v. Blandford*, 8 P. D. 19; *Curtis v. Curtis*, 1 Sw. & T. 192. And the Chancellor of Ontario in *Aldrich v. Aldrich*, 21 O. R. 447, followed the latter cases.

In *Collins v. Collins*, 9 App. Cas. 205, it was held that "By the law of Scotland full condonation of adultery (remission expressly or by implication, in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a *remissio injuriæ* absolute and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery." But in that case the plaintiff did not succeed in proving subsequent acts of adultery. There were certain very indiscreet acts on the part of the wife subsequent to the condonation, with the same person with whom she had committed the adultery condoned, but nothing short of actual adultery since, it was held, could remove the condonation; and to obtain divorce he must prove adultery subsequent, and no less. But this decision only reaches to the case of adultery, not acts of legal cruelty of a less serious character, and in this case Lord Blackburn says: "The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being

Judgment. entered into with full knowledge of the guilt and with
Robertson, J. free and deliberate intention to forgive it, where that reconciliation is followed by living together as man and wife, the status of the couple ought to be the same, and not more precarious than if there was a new marriage." And Lord Young, in his judgment in the case in appeal said, at p. 229, note: "I ought, perhaps, to observe that cruelty stands on quite another ground. Cruelty is cumulative, admitting of degrees, and augmenting by addition, so that it may be condoned and even forgiven for a time and up to a certain point without any bar in sense or reason to bringing it forward when the continuance of it has rendered it no longer condonable."

After much consideration of the evidence and the authorities above referred to as well as others, the conclusion I have come to is, that the plaintiff has made out a case to entitle her to alimony. In considering the facts we are at liberty to travel back over the whole married life of these unfortunate people. From almost the beginning the husband has shewn himself to be well within the character that the learned trial Judge felt forced to give him. There is no doubt that on the occasion referred to in the evidence, which took place a little more than two years before the trial, when he beat the plaintiff about the head until she became insensible, had she left him then, she would have been entitled to relief. This she, however, condoned, but on the authorities that condonation was conditional upon no recurrence of any ill-treatment which would make it reasonable for her to fear that he would re-enact his former violence. Now, how can one read the evidence and come to any other conclusion than that the plaintiff was remaining at her home at the risk of personal violence being meted out to her at any time, the husband might come into the house? She was evidently in a state of perpetual dread; his violent temper, his drinking habits, and his carrying a revolver about his person and flourishing it about when loaded, to the danger of all those present, were facts that must have been ever present to

her mind. She bore up against it as long as two or three of her children were left to her, but he having driven them from their home, by his violence and unfatherly conduct, what was there left to keep the plaintiff in a state of mind which could possibly have reassured her that she would not be his victim at any moment? In my judgment she had ample cause for apprehending serious bodily hurt. She had suffered at his hands before; she knew the inclination of his mind. His treatment of her had been such that she honestly believed that he had a violent hatred of her, and there was no saying what moment he would fly into an uncontrollable rage and inflict serious bodily harm, if not (as he threatened he would) reduce her to that state that "she would not be able to take the law of him." For these reasons, with all respect for the opinion of the learned trial Judge, I think the judgment should be set aside and a new trial had between the parties, and that the defendant should pay the costs of the last trial as well of this motion forthwith after taxation.

In addition to the cases above referred to I have also consulted and considered the following authorities, which, in my judgment, more or less support the contention of the plaintiff: *Durant v. Durant*, 1 Hagg. 733, 761; *Mackenzie v. Mackenzie*, [1895] App. Cas. 384; *Paterson v. Paterson*, 3 H. L. Cas., 308; *Kelly v. Kelly*, L. R. 2 P. & D. 59; *Rodman v. Rodman*, 20 Gr. 428; *Ferris v. Ferris*, 7 O. R. 496; *Brown & Powles on Divorce*, 109, and *Dixon on Divorce*, 311.

FERGUSON, J. :—

I entirely agree with the opinion of my brother Robertson, and have little indeed to add to the exhaustive judgment written by him. Condonation has been defined to be "forgiveness with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness. On breach of the condition, the right to a remedy for the former

Judgment. injuries revives": *Rodman v. Rodman*, 20 Gr., 428, at p. 440, and authorities there cited.
Ferguson, J.

There can be no doubt that in this case the former injuries were such as to entitle the plaintiff to a judgment for alimony if they had not been condoned. The former injuries were not adultery but cruelties of a character altogether different from this.

I am of the opinion that what the evidence shews took place the evening before the separation, and the day of the separation, (which, I think, are to be considered as one continuous act), are sufficient to revive the remedy for the former injuries, even if it be conceded that these were not sufficient, taken independently, to found a judgment for alimony; and, with all respect for contrary opinions, I am unable to see how, in such circumstances, there can be any sufficient excuse for the defendant.

There should, I think, be a new trial, and I agree as to the disposition of the costs.

G. F. H.

[QUEEN'S BENCH DIVISION.]

THE CENTRAL BANK V. ELLIS.

Receiver—Equitable Execution—Pending Action—Unliquidated Damages.

A receiver will not be appointed by way of equitable execution on behalf of a judgment creditor to receive the amount of a claim for unliquidated damages which his debtor is seeking to recover in a pending action.

THIS was an appeal from the judgment of MEREDITH, J., Statement. dismissing a motion for the continuance of the appointment of a receiver.

On the 9th of April, 1888, judgment was recovered by the Central Bank against P. Ellis and another for \$3,019.11, which judgment was still unpaid and had passed into the hands of F. A. Hogaboom, George A. Case and Charles Miller.

On the 27th of March, 1896, upon their application an order was made *ex parte* appointing one Bleakley to be receiver, until a day named and until a motion to be then made to continue him as such receiver, to receive all moneys which the defendant Ellis might recover in a certain action pending at his suit against the News Printing Company of Toronto and William Douglas; and that the moneys to be collected by such receiver should be applied in or towards satisfaction of the judgment in this action.

The action of *Ellis v. News Printing Co.* was an action to recover damages from the defendants therein for the alleged publication of a libel upon the plaintiff.

On the 2nd of April, 1896, the plaintiffs moved on notice before MEREDITH, J., to continue the receiver, and the motion was refused with costs.

On the 16th of April, 1896, the plaintiffs moved by way of appeal from the order of Mr. Justice MEREDITH to a Divisional Court, composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

Miller, for the plaintiffs.

Raney, for the defendant.

Judgment. April 30th, 1896. The judgment of the Court was delivered by
Street, J.

STREET, J. :—

The extent of the jurisdiction of the Court to appoint receivers for the purpose of realizing the claims of creditors has been carefully considered and defined by Courts of Appeal in England in three late cases which, I think, leave no doubt as to the correctness of the judgment from which the plaintiffs here are appealing. The cases to which I refer are *Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801; *Cadogan v. Lyric Theatre (Limited)*, [1894] 3 Ch. 338.

It is pointed out in these cases that the remedy given to a creditor by the appointment of a receiver to receive on his behalf moneys due the debtor, and commonly called "equitable execution," is, in fact, equitable relief granted to a creditor upon a proper case being made out shewing the debtor entitled to equitable rights which would be subject to ordinary execution if they had been legal instead of equitable in their nature. The nature of the relief granted in such cases by the Court of Chancery was to make the equitable rights available for the purpose of satisfying the claim of the creditor by removing the obstacles in the way of their realization at law or by realizing them through its own process and forms for the same purpose. The jurisdiction of the High Court and its branches, in this respect, under the Judicature Act, is precisely that which was formerly exercised by the Court of Chancery, and nothing has been brought within the reach of a creditor by the receivership clause of the Judicature Act which could not have been realized by some legal or equitable remedy before that Act was passed.

I think this must be taken to be the rule which we must apply to the present case; and as it is quite plain that a claim to unliquidated damages such as the present, was never before the Judicature Act seizable under execu-

tion either at law or in equity, we must refuse to appoint a receiver to enable the judgment creditors here to realize it in its present shape. Judgment.
Street, J.

The appeal must therefore be dismissed with costs.

G. F. H.

[CHANCERY DIVISION.]

RE ROBINSON.

Infant—Charitable Institution—Indenture—Domestic Servant—Right of Mother to Custody.

Where an infant under the protection, with her mother's consent, of the Girls' Home, a charitable institution incorporated by 26 Vict. ch. 63 (C.), and 50 Vict. ch. 91 (O.), was, under the powers conferred by these Acts, indentured as domestic servant, an application by the mother to have such indenture set aside and for the custody of the child was refused.

THIS was a motion made 4th November, 1895, on the return of a writ of *habeas corpus* issued at the instance of the mother of Alice Robinson, an infant, for the delivery to her of the infant. Statement.

The facts, as stated by STREET, J., were shortly as follows:

In October, 1883, the applicant being in the city hospital and her husband, being unfit from his habits to live with her or to take charge of the four children of their marriage, and being then in fact in gaol, the children were placed with the consent of the mother and without any dissent from the father in "The Girls' Home," a charitable institution incorporated under a special Act 26 Vict. ch. 63 (C.), and 50 Vict. ch. 91 (O.). At that time the eldest of the children was seven years of age and the youngest eighteen months. Alice, the girl in question in these proceedings, was three years of age or thereabouts. The eldest child remained in the Home for about three

Statement. years, when she was indentured for a few months, but being returned by the person to whom she had been indentured, was given up to her mother in March, 1887, upon her mother's request: the two other children remained at the home for nine or ten years respectively, and were given up to their mother at her request, one in 1893, the other in 1894.

In the meantime on 2nd March, 1892, the girl Alice, after being in the Home for between eight and nine years, being then between eleven and twelve years of age, was apprenticed by indenture by the Girls' Home as a domestic servant to a Mrs. Pieper living near Owen Sound for a period of six years. There she has remained ever since until the institution, by the mother, of the present proceedings. Mrs. Pieper claims to be entitled to her services until the expiration of the indenture, but submits to the order of the Court.

J. E. Jones, for the applicant.

R. S. Neville, for Mrs. Pieper.

November 10th, 1895. STREET, J.:—

It is plain from all the evidence before me that the applicant Mrs. Robinson assented in the most unequivocal manner to the placing of her children, including her daughter Alice, under the care and protection of the Girls' Home upwards of twelve years ago. At that time the children were in a state of utter helplessness, the eldest of them being only seven years old, their mother in the hospital and their father in gaol. Alice was maintained at the expense of the Home with the exception of some small payments credited in the books of the treasurer of the Home made by her mother until 1892, when she was indentured to Mrs. Pieper. This indenture was entered into under the authority of the 4th sec. of the Act of Incorporation as amended in 1887, which gives the directresses of the Home power to bind or apprentice to service all

children having the protection of the Home upon such terms as they may deem proper, and provides that the agreements so made may be enforced.

Judgment.
Street, J.

I can find absolutely no reason whatever for holding in the present case that the mother is entitled to have this indenture set at naught and the child returned to her. She was clearly a child having the protection of the Home at the time she was apprenticed: the mother was and had been for years an assenting party to her being at the Home and under its protection and made no application for her return until she had ceased to be helpless. No objection has been urged to the terms of the indenture nor to the treatment of the girl: in fact if I thought the case were one in which I had a discretion to exercise I should probably have come to the conclusion that the best interests of the infant herself would be served by leaving her where she is.

I think the application must be refused, and I can see no reason why the applicant should not be ordered to pay the costs.

From this judgment the applicant appealed to the Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ., and the appeal was argued on the 11th December, 1895.

J. E. Jones, for the appeal.

Neville, contra.

April 10th, 1896. The judgment of the Court was delivered by

FERGUSON, J.:—

After what I think a careful perusal of the statutes bearing on the subject, and all that appears, I do not perceive any reason for disturbing the judgment of my brother Street, which I think quite correct.

G. F. H.

IN RE YOUNG V. WARD.

Creditors Relief Act—Division Court Execution—Return of Nulla Bond—Execution to Sheriff—57 Vict. ch. 23 (O.)—Prohibition.

On the return of *nulla bond* to a Division Court execution, the plaintiff, under 57 Vict. ch. 23 (O.), amending the Division Courts Act, issued out of said Division Court an execution against lands to the sheriff of another county, but before the sheriff had taken any steps to enforce it, the defendant paid to him the amount thereof, with the request that it should be applied on plaintiff's execution. At the time of such payment there were other executions in the hands of the sheriff against the goods and lands of the defendant:—

Held, reversing the judgment of the County Court Judge, that the Creditors' Relief Act applied to the moneys so received by the sheriff.

Statement.

THIS was an application for a writ of prohibition to the Judge and clerk of the tenth Division Court of the county of York.

The plaintiff, Catharine Young, herein recovered judgment in the first Division Court of the county of York against the defendant, William Ward, for \$69.87, including costs: an execution was issued and returned *nulla bond*; and thereupon the plaintiff, under the amendment to the Division Courts Act, enacted by sec. 8 of 57 Vict., ch. 23 (O.), issued an execution against the defendant's lands, out of the said first Division Court directed to the sheriff of the county of Ontario to levy the amount of the judgment.

While this execution was in the sheriff's hands, and before any steps had been taken by the sheriff to enforce it, the defendant's solicitors forwarded to the sheriff a sum of money sufficient to cover the amount of the judgment debt and sheriff's fees, with a request that he would apply it in satisfaction of the execution and return it. The sheriff had at the time he received the amount other executions against the lands and goods of the defendant, and the execution creditors under these executions claimed to have the amount received by the sheriff distributed under the Creditors' Relief Act. The defendant insisted that the money paid should be applied by the

sheriff in satisfaction of the particular judgment upon which it had been paid, and applied, upon notice to the plaintiff, to the Judge of the county of York having jurisdiction over the Division Court in which the judgment was obtained and from which the execution had issued, for an order, under the 256th Division Court Rule, directing the clerk of the Division Court to enter satisfaction in the procedure book of the Court. Statement.

The learned Judge gave a written judgment in which, referring to the Creditors' Relief Act, he said: "I am of opinion that this Act does not apply. It only has its operation by virtue of a levy under an execution issued out of the High Court and not out of the Division Court. The money levied by the sheriff on a Division Court execution must by sub-sec. 3 of sec. 8 of 57 Vict. ch. 23 (O.), be paid by him to the clerk of the Division Court out of which the execution issued. The sheriff of Ontario must therefore pay the money realized under the execution in this Court to the clerk of this Court, and cannot distribute it, as contended for by the plaintiff and the other execution creditors. The order must therefore go directing the clerk of this Court to enter up satisfaction of the judgment in the procedure book as soon as the sheriff returns the money to him."

Thereupon the plaintiff applied in Chambers, upon notice to the defendant and to an execution creditor, claiming under the Creditors' Relief Act, and to the Judge and clerk of the Division Court, for an order prohibiting the Judge and clerk of the Division Court from proceeding further upon the order to enter up satisfaction upon the roll, upon the ground that the Judge of the county of York had no jurisdiction to interfere with the distribution of money in the hands of the sheriff of Ontario under the circumstances, or to affect the rights of parties claiming the proceeds of an execution in the hands of that sheriff.

The motion was heard on 20th March, 1896, before BOYD, C., who on 21st March, 1896, delivered the following judgment :

Judgment. BOYD, C. :—

Boyd, C.

Looking at the general course of legislation, I think that "The Creditors' Relief Act" is intended to apply to all moneys received by the sheriff in his official capacity by virtue of executions in his hands.

The learned County Judge has rightly dealt with the money paid by the judgment debtor as money levied or obtained by means of the execution (see 52 Vict. ch. 10, sec. 7), but he has held that "The Creditors' Relief Act" does not apply when the money is made under an execution issued out of the Division Court. But the execution in this case by virtue of 57 Vict. ch. 23, sec. 8, is in operation and effect a County Court execution. It goes to the hand of the executive officer of the county, and is to have force and be prosecuted as if judgment had been obtained in the County Court and as if the writ had issued from the County Court. If the provisions of "The Creditors' Relief Act" apply, as I think they do, the sheriff is then seized of these moneys as a statutory administrative officer, no longer amenable to the jurisdiction (if he ever was) of the County Judge of another county, but subject to such supervision as is given in the body of "The Creditors' Relief Act." If the money paid by the debtor cannot be legally applied as he wished it to be applied, it might be a question whether his remedy is not to obtain it back from the sheriff, but I do not think that it can be applied by order of the Court in contravention of the law.

The order for prohibition is granted, but it is not a case for costs.

The defendant appealed to the Divisional Court against this judgment, and the appeal was heard on 13th April, 1896, before FALCONBRIDGE, and STREET, JJ.

J. E. Jones, for the appellant William Ward.

Swayzie, for the respondent Catherine Young.

Macdonald, for Marion Ward, an execution creditor of William Ward, having an execution in the hands of the sheriff of Ontario, and also for the sheriff of Ontario.

April 21, 1896. The judgment of the Court was delivered by

Judgment.

Street, J.

STREET, J. :—

The learned Judge of the County Court has based his decision upon the broad ground that the Creditors' Relief Act has no application to moneys received upon Division Court executions. In this opinion I am unable to concur.

The Creditors' Relief Act nowhere in express terms excludes Division Court judgments, or moneys realized under Division Court proceedings from the scope of its operation. The reason why it did not apply to moneys realized upon Division Court executions was because it is confined by section 4 to moneys levied by a sheriff, and does not extend to moneys levied by a bailiff: so that when, as in the present case, the change in the law has required the sheriff to levy money due upon a Division Court judgment there is nothing in the Act to take the money so levied out of the rule that all moneys levied by a sheriff are subject to its provisions.

Nor is there anything forced or unjust in such a construction, because under the sections of the Division Courts Act, replaced by those under which the present execution was issued, the plaintiff's Division Court judgment must first have been converted into a County Court judgment by transcript before execution against lands could have been issued at all, and the moneys levied under it would undoubtedly have been subject to the Act. Nor is there anything in the construction I have adopted which conflicts with the 3rd sub-sec. of sec. 8 of 57 Vict., ch. 23: "The sheriff receiving such writ of execution shall make a return thereof and pay any money made thereon to the clerk of the Court out of which such execution issued," because under the 29th section of the Creditors' Relief Act the money made upon this execution is to be taken as made by the sheriff upon all the writs in his hands entitled

Judgment. to share in the money made : all he is to endorse as made
Street, J. upon this particular writ is the share which is allotted to it under the scheme of distribution, and that is the amount he should pay over to the clerk of the Division Court.

I come to the conclusion therefore that moneys levied by a sheriff under a Division Court execution are subject to the provisions of the Creditors' Relief Act, just as moneys levied under High Court and County Court executions are ; and, whatever may be the right of the Judge presiding in the Division Court out of which the execution issues to the sheriff, to order a return of it where there are no other executions in his hands, I think he has no right to pronounce upon the claims of other execution creditors to a share in the money levied under it, because disputes of that kind are placed by the 2nd and 32nd sections of the Creditors' Relief Act under the jurisdiction of the Judge of the County Court in which the claims are filed.

The only order actually made by the learned Judge of the County Court of York was, that upon payment to the clerk of the Division Court by the sheriff of the moneys levied by him upon the execution, satisfaction should be entered in the procedure book by the clerk ; with this order, had it stood alone, no fault could be found, but his written decision went further and said : " The sheriff of Ontario must pay the money realized under the execution in this Court to the clerk of this Court, and cannot distribute it as contended for by the plaintiff and the other execution creditors."

The counsel who appeared for the defendant on the motion before the Chancellor and who is opposing the motion for prohibition, refused to treat this part of the decision of the learned Judge of the County Court of York as a mere expression of opinion not binding upon the sheriff or the other execution creditors, and thus, I think, deprived himself of the right to urge that it was not a proper case for prohibition.

I do not think that upon a motion of this kind we can consider whether under the circumstances disclosed in the

affidavits the money paid to the sheriff by the defendant's solicitors was money levied upon the execution within the meaning of the Creditors Relief Act. That seems to be a question of fact which does not arise upon or affect the motion for prohibition. What we are called upon to decide here is whether under any circumstances the county Judge of York had any jurisdiction to deal with the scheme of distribution proposed by the sheriff of another county, and in my opinion he had not.

Judgment.
Street, J.

The appeal must therefore be dismissed with costs.

G. F. H.

THE TRUSTS CORPORATION OF ONTARIO V. RIDER.

Chose in Action—Parol Assignment of—R. S. O. ch. 122, sec. 7.

A parol assignment of book debts is valid under the Mercantile Amendment Act, R. S. O. ch. 122, sec. 7, and does not require the assent of the debtor.

THIS was a special case wherein the plaintiffs were the administrators of the estate of Frank J. Rosar, late of the city of Toronto, undertaker, deceased, who died on December 15th, 1895, and the defendant was a wholesale dealer in undertaker's supplies, who sold extensively to Rosar, and stated as follows:—

At and prior to his decease, and at the time of the verbal assignments hereinafter referred to, Rosar was indebted in a considerable sum of money to the defendant: as security for such indebtedness, Rosar endorsed over to the defendant promissory notes received by him from his customers in payment of funeral accounts, and duly assigned to the defendant by endorsement thereon in writing, certain book debts or accounts due him for funeral supplies and services: bills of accounts respecting other book debts due to Rosar from his customers, were from time to time by him handed to the defen-

Statement. dant with the purpose and intent of assigning and transferring the same as security as aforesaid, any moneys collected therefrom to be applied in reduction of the indebtedness of Rosar to him: Rosar at the time of so handing the accounts or book debts to the defendant, used words which would, if in writing, constitute a valid legal assignment; but there was no assignment thereof by any form of writing; and the plaintiffs contended that upon the above facts the defendant had no valid title to the book debts or accounts lastly mentioned. The parties prayed the Court to determine and declare to which of them the accounts lastly above mentioned, and all accounts or book debts of Rosar in like position belonged, and by whom the costs of the action should be borne.

The case was argued on February 12th, 1896, before FALCONBRIDGE, J.

Anglin, for the plaintiffs. There is no decision in our Courts since the Act 35 Vict. ch. 12, sec. 1, R. S. O. ch. 122, sec. 7, that a verbal assignment is good. For a case under the English Act, see *In re Richardson, Shillito v. Hobson*, 30 Ch. D. 396. And see *Jolly v. Handcock*, 7 Ex. 820, 22 L. J. Ex. 38; *Cadogan v. Earl of Essex*, 2 Dr. 227; *Beauclerk v. Ashburnham*, 8 Beav. 322. The dropping out of the words "at law," does away with the equity rule if it prevailed theretofore. The assent of the debtor is necessary, even if parol assignment be sufficient: *Armstrong v. Farr*, 11 A. R. 186, at p. 190. At common law the assent of the debtor was always necessary to a right of action: *Sterling v. McEwan*, 18 U. C. R. 466; *Israel v. Douglas*, 1 H. Bl. 239; *Tatlock v. Harris*, 3 T. R. 174. There appears to be no case in equity where a verbal assignment has been held good without the assent of the debtor.

Urquhart, for the defendant. The intention of the Act was to make choses in action assignable at law. Verbal assignments are not excluded by anything in the Act. A

valid equitable assignment may be made verbally: *Gurnell v. Gardner*, 9 Jur. N. S. 1220. There does not seem to have been here any assent on the part of the debtor. See, also, *White & Tudor*, L. C. vol 2, 6th ed., p. 843; *Parish v. Poole*, 53 L. T. 35. A valid charge upon personalty can be created by parol; *Heath v. Hall*, 4 Taunt. 326; *Mitchell v. Goodall*, 5 A. R. 164. As to notice and assent, see *Farquhar v. City of Toronto*, 12 Gr. 186. Assent is not necessary to an equitable assignment; and notice is only necessary to preserve priority. There is no necessity for any assent by the debtor, nor need the assignment be in writing: *Lamb v. Sutherland*, 37 U. C. R. 143; *Armstrong v. Farr*, 11 A. R. 186; *Hall v. Prittie*, 17 A. R. 306, per Osler, J.A., at p. 310; *Lane v. The Dunganon Agricultural Driving Park Association*, 22 O. R. 264. The American law seems in accordance with our own. We have established a good assignment of the various debts. See, also, *Smith v. The Corporation of Ancaster Township*, 45 U. C. R. 86.

Anglin, in reply. As to *Gurnell v. Gardner*, there was the assent of the debtor there, in fact he was the person who made the assignment. As to *Lamb v. Sutherland*, this was before the words "at law" were omitted from the statute. So with *Armstrong v. Farr*. This is not a question of conflict between rules of equity and rules of law, but between the statute and rules of equity. A written document does not require the assent of the debtor, but a verbal one does: see *Snow's Annual Practice*, 1896, p. 35.

June 15th, 1896. FALCONBRIDGE, J.:—

"It was a well-known doctrine in equity long before the Judicature Acts or our own Act in reference to assignments of choses in action, that a debt was assignable in equity and binding upon the debtor upon notice": Per Burton, J. A., in *Hall v. Prittie*, 17 A. R. at p. 307.

And a parol assignment, if clearly proved, would be sufficient: *Heath v. Hall*, 4 Taunt. 326; *Gurnell v. Gardner*, 9 Jur. N. S. 1220; *Armstrong v. Farr*, 11 A. R. 186.

Judgment. The provisions of the 35 Vict. ch. 12, sec. 1 (O.), were as
Falconbridge, follows :—
J.

“Every debt and chose in action arising out of contract, shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof, shall sue thereon in his own name in the action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province.”

Then came the Ontario Judicature Act, 1881, 44 Vict. ch. 5, which provides (sec. 17, sub-sec. 10) that generally where there is any conflict or variance between the rules of equity and the rules of the common law, the former shall prevail (repeated in 58 Vict. ch. 12, sec. 53, sub-sec. 12).

The revision of 1877 had not altered the provisions of the 35 Vict. ch. 12; but in the revision of 1887 (ch. 122, sec. 7) the words “at law” are omitted.

It is contended for the plaintiffs that this is a new enactment, and that a writing is now imperative.

Commenting on the English section (Judicature Act 1873, sec. 25, sub-sec. 6) which is much more complex than ours, and in form deals more with procedure, the learned editors of Chitty on Contracts (12th ed., p. 861), say: “This subsection gives no new right of action which did not exist before; and it is submitted that it cuts down the powers of equitable assignment to the powers described in the section itself; so that for instance a parol assignment which was valid in equity before the Act is now invalid though a contrary view has been put forward.”

The “contrary view” was expressed in Coote on Mortgages, 4th ed., p. 499, but in *In re Richardson, Skillito v. Hobson*, 30 Ch. D., at p. 397, Mr. Justice Kay thought the effect of the section was to prevent any interest in a debt or other chose in action passing without an assignment in writing.

I think, however, that the present case is to be determined adversely to the plaintiffs by the decisions and the

dicta of the Judges in *Armstrong v. Farr*, 11 A. R. 186; Judgment.
Hall v. Prittie, 17 A. R. 306, and *Lane v. Dungannon* ^{Falconbridge,}
Agricultural Park Association, 22 O. R. 264. ^{J.}

The omission of the words "at law" in the revision of 1887 was probably made in view of the changes in law and practice effected by the Ontario Judicature Act, and it has, therefore, no significance at any rate except as a question of procedure. Here the assignee is not suing.

And the cases of *Farquhar v. Toronto*, 12 Gr. 186 at p. 189; *Lamb v. Sutherland*, 37 U. C. R. 143; and *Smith v. The Corporation of Ancaster Township*, 45 U. C. R. 86, seem to be in favour of the defendant as to the necessity of the assent of the debtor.

The defendant is, therefore, declared to be entitled to the accounts in paragraph 8 of the special case set forth and to all accounts or book debts of F. J. Rosar deceased in like plight and position, and I see no reason why he should not have his costs, which I accordingly award to him.

A. H. F. L.

MCFADYEN v. MCFADYEN.

Will—Construction—Devise of Land not Owned by Testator—Application to Land Owned by Testator.

A testator purporting to devise "all his real and personal estate," gave to one son the south fifty acres of lot 21, and to another the north fifty acres of the same lot. The will contained no residuary devise and no other gift of land. The testator died seized of the east half of lot 21, 100 acres, but had no interest in the west half:—

Held, that the one son took the south twenty-five acres of the east half of the lot and the other the north twenty-five acres, and they took together the central fifty acres as tenants in common.

Statement. THIS was a motion for judgment on the pleadings in an action for the construction of the will of Hugh L. McFadyen under the circumstances set out in the judgment.

The motion was argued on June 3rd, 1896, before FERGUSON, J.

Casey Wood, for the plaintiffs.

C. Bethune, for the adult defendant.

A. T. Boyd, guardian *ad litem* for the infant defendants.

The following cases were referred to:—As to the admissibility of evidence of surrounding circumstances at the date of the will: *Summers v. Summers*, 5 O. R. 110; *Re Shaver*, 6 O. R. 312. As to the applicability of the maxim *falsa demonstratio non nocet*: *Doe d. Lowry v. Grant*, 7 U. C. R. 125; *Re Shaver*, *supra*; *Wright v. Collings*, 16 O. R. 182. *Hickey v. Stover*, 11 O. R. 106; *Hickey v. Hickey*, 20 O. R. 371; *Re Bain and Leslie*, 24 O. R. 136, were also referred to.

June 9th, 1896. FERGUSON, J.:—

The action is for a declaration that by the terms of the last will and testament of the late Hugh L. McFadyen, the plaintiff, Hector Allen McFadyen, acquired a title to the south fifty acres of the east half of lot number twenty-one in the seventh concession of the township of Brock, and that the plaintiff, Laughlin McFadyen, by the same will,

acquired a title to the north fifty acres of the east half of the same lot. The defendants do not seem to contend against what is asked by the plaintiffs, but simply say that their interests are against the plaintiffs' contention and they submit their rights, etc. What, and all, I can say is whether or not the terms of the will are sufficient in my opinion to pass to the respective plaintiffs the lands claimed by them respectively, for such title thereto as the late Hugh L. McFadyen had at the time of his death. Judgment.
Ferguson, J.

The words of the will that are of importance here are: "I give, devise and bequeath all my real and personal estate of which I may die possessed or interested in, in manner following, that is to say: I give and bequeath to my son Hector Allen the south fifty acres of lot number twenty-one, in the seventh concession of the township of Brock, and one-half of my personal effects and property of whatsoever nature or kind. I give and bequeath to my son Laughlin the north fifty acres of lot number twenty-one in the seventh concession of the township of Brock and the remaining half of my personal effects and property."

The will contains no residuary devise. No other gift of land.

The testator resided for many years, and at the time of his death, upon the east half of this lot number twenty-one (100 acres). His father had also resided upon and was the owner of this east half, and it came to the testator by his father's will. Assuming that the title was good the testator was the owner of the east half of this lot number twenty-one, and, as conceded, he, the testator, did not own nor had he any interest in the west half of this lot twenty-one or any other land. The will bears date the twenty-eighth day of March, 1887. As appears by the probate the testator died on or about the twenty-fourth day of May, 1887. The case came before me on a motion for judgment on the pleadings. On the face of the will it seems clear that the testator intended to devise all his

Judgment. lands and that the only devisees of the same should be the two plaintiffs. The intention to give all his lands to these two devisees is manifest. According to the letter of the will, the plaintiff Hector Allen McFadyen took the south twenty-five acres of the east half of the lot, and the plaintiff Laughlin McFadyen the north twenty-five acres of the same east half.

Ferguson, J.

Although there are many cases bearing some resemblance to this one, I have not found any case like it.

I am, however, clearly of the opinion that the central fifty acres of the east half of the lot passed by the will to the two plaintiffs for all the estate and interest therein that their father had at the time of his death, and, I think, as tenants in common. This last, however, may not be material here.

The plaintiffs seem not to disagree about the matter in any way or manner, and each of them can make an appropriate conveyance to the other of all his interest in the proper twenty-five acres of this central fifty acres of the east half of the lot, after which the plaintiff Hector Allen will have the south fifty acres and the plaintiff Laughlin will have the north fifty acres of the east half of the lot. I cannot, at present, make the vesting order asked.

If costs are asked, the costs of all parties should be borne by the land in question, that is, the owners of it—the plaintiffs.

A. H. F. L.

IN RE PLUMB.

Trusts—Marriage Settlement—Mortgage Investments—Loss on Realization—Apportionment Between Life Tenant and Remainderman.

Where a loss occurs under a mortgage of trust funds, the income of which is payable to a life tenant, the loss should be apportioned between the tenant for life and the remainderman by adding the amount actually realized from the security to the amount of interest theretofore received by the tenant for life and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received.

In re Foster, Lloyd v. Carr, 45 Ch. D. 629, followed.

THIS was a petition presented to the Court for advice Statement. under R. S. O. ch. 110, by the Toronto General Trusts Company, the trustees of a marriage settlement. Previous trustees under the settlement, had invested portions of the estate on mortgages upon which loss would occur. The petition was presented by the Trust Company, the now trustees, asking for the direction of the Court as to the apportionment of such loss.

The motion was made on June 3rd, 1896, before FERGUSON, J.

H. D. Gamble, for the trustees, submitted the question to the Court.

H. J. Scott, Q. C., for the tenant for life. The matter has been settled in England by a series of decisions, ending with *In re Foster, Lloyd v. Carr*, 45 Ch. D. 629, and *In re Moore, Moore v. Moore*, 54 L. J. N. S. 432, which two cases are exactly on all fours with this case, and we ask that a similar order be made here. He also referred to *Re Box*, 1 H. & M. 552; *Turner v. Newport*, 2 Ph. 14; *Cox v. Cox*, L. R. 8 Eq. 343; and *In re Duke of Cleveland's Estate, Hay v. Wolmer*, [1895] 2 Ch. 542. The only case opposed to this view of the law is *Grabowski's Settlement*, L. R. 6 Eq. 12, which case is practically overruled by *Cox v. Cox*, and stated so to be in *Lewin on Trustees*, 9th ed., p. 1047-8. Apart

Argument. from authority, equity would distribute the loss as set out in *Re Foster*.

Harcourt, for infant remainderman. The principal of the estate should be kept intact and all loss charged against the income until the estate is replaced, and this is the decision in *In re Grabowski's Settlement*, and should be followed in this country where there is no decision as yet.

FERGUSON, J. :—

If I had to decide this case apart from authority, I should come to the same conclusion as was come to in *Re Foster*. I make the order in accordance with the decision in that case.

The order as drawn up was as follows :—

This Court doth declare that the loss upon any mortgages, part of the trust estate under the said settlement, ought to be apportioned by the said trustees between the said Augusta Maria Plumb as tenant for life, and the parties entitled after her decease as follows: That the said trustees do, when any security is realized which does not produce a sufficient sum to pay in full the principal and interest and charges thereon, take the following accounts :

(1.) An account of the amount which would be required to pay off the said security in full, including both principal and interest and any other charges against the same.

(2.) An account of what proportion of the said money in the preceding paragraph mentioned, if it had been paid, would have been payable to the said Augusta Maria Plumb, and the amount which would have belonged to the principal of the trust fund.

(3.) An account of the interest upon the said security, if any, which has already been paid to the said Augusta Maria Plumb. After the taking of the said accounts, the amount realized from the security, and the amount already paid to the said Augusta Maria Plumb, are to be added

together, and the said added amount is to be divided between the said Augusta Maria Plumb, and the estate, in proportion to the amount that they would have been entitled to if the whole of the said security had been paid in full, and the said Augusta Maria Plumb is to stand charged as to her portion thereof with the amounts already paid to her. Judgment.
Ferguson, J.

And this Court doth further order that the costs of all parties including those of the Official Guardian, be taxed and paid out of the said estate and charged to the principal account thereof, those of the petitioners as between solicitor and client.

A. F. H. L.

[COMMON PLEAS DIVISION.]

THE QUEEN EX REL. WARNER V. SIMPSON.

Pharmacy Act—Departmental Store—Drug Department—Uncertificated Proprietor—R. S. O. ch. 151, sec. 24.

The defendant being owner of a departmental store, opened a drug department therein and placed it under the sole control of a duly qualified and registered chemist who sold the drugs in the defendant's name, receiving as remuneration a weekly salary and also a percentage of profits, the defendant himself not being a duly qualified and registered chemist :—

Held, that the defendant was liable to be convicted under section 24 of the Pharmacy Act, R. S. O. ch. 151, for keeping an open shop for retailing, dispensing and compounding poisons, etc., contrary to its provisions.

THIS was a case stated by the police magistrate of the city of Toronto, to the following effect :— Statement.

“ The defendant Simpson is the owner of a large departmental store building at the corner of Queen and Yonge streets in Toronto, and was charged before me on the information and complaint of one Frank S. Warner, that he did during the months of February, March and April, 1896, unlawfully keep open shop at the city of Toronto, for retailing, dispensing, and compounding poisons con-

Statement. trary to the form of the Pharmacy Act and amendments thereto. On the ground floor of said building, a space is set apart for a drug department, which apartment is and has been under the management and control of one Charles P. Lusk, a duly qualified pharmaceutical chemist, registered under the Pharmacy Act, and who had taken out the certificate under the provisions of section 18 of said Act. It was admitted that the said Lusk did in said department, dispense certain drugs containing poison, and sell certain poisons, all of which are mentioned and set out in schedule 'A' of the Pharmacy Act, and amendments thereto, giving to the respective purchasers a bill of same on which defendant Simpson's name was printed, and on one of which bills said Lusk had stamped his own name, and thereunder the word 'druggist'; at the time of the purchase of same, said Lusk gave some of the purchasers thereof the printed circular marked exhibit 'I,' which forms part of this case; the said Simpson was never inside the said drug department, and never interfered with the conduct of the business therein; all the goods including the said poisons, required for said department, after the employment of the said Lusk, were from time to time purchased by the said Lusk on his own judgment without consultation with the said Simpson, but with the moneys or upon the credit of the said Simpson, who also received the proceeds of all sales made in such department, such proceeds going into the general cash receipts of the whole departmental store; poisonous drugs required in connection with the dispensing were kept in a closed dispensary partitioned off in said store, and of which said Lusk had the key, and no other employee in said department could gain access thereto without the permission of said Lusk; and upon leaving the department at night, said dispensary was locked and the key kept by the said Lusk; but there are some poisons mentioned in schedule 'A' of said Act which are not in said partitioned dispensary, but are kept on shelves and in drawers behind the counters in the said drug department;

the position between the said Simpson and the said Lusk, Statement. appears by the agreement in writing between them, a copy of which is hereunto annexed, and which forms part of this case, and there was a verbal agreement between said Simpson and the said Lusk, that the latter should have absolute control of the said drug department, to the exclusion of said Simpson: on the foregoing facts, and in my view of the law, I dismissed the information and complaint of the said Warner, and my order of dismissal being questioned by the prosecutor on the ground that the defendant was guilty of the offence charged in the information under section 24 of the Pharmacy Act, I state this case so that my decision on the law of the case may be reviewed by the Division of the High Court of Justice." The information was under section 24 of the Pharmacy Act, R. S. O. ch. 151.

Under the agreement between the defendant and Lusk above referred to, Lusk covenanted "to manage the drug and patent medicine business to be carried on in the premises" of the defendant, "and to sell, dispense, and compound poisonous drugs and medicines required in carrying on said business. The said Lusk shall receive one per cent. of the net profits to be derived from all sales of drugs and from all sales of patent medicines containing poison, and an additional sum of \$15 a week, but it is expressly understood and agreed that the said Lusk shall not be entitled to any commission on patent medicines not containing poisons. The agreement may be terminated by either party on one week's notice." These were all the clauses of the agreement.

The circular above referred to, after stating the prices of certain articles in the patent medicine department, was worded as follows:—

"To the interested public: You have had at some time or other a case of sickness in your house, requiring the daily attendance of a physician, and necessarily the daily filling of prescriptions at the drug store.

Statement. You were interested financially in the filling of these prescriptions.

We are now prepared with a complete drug department to serve you, to your interest, at the lowest rate of profit compatible with the quality of our drugs.

We guarantee you purity and uniformity in our drugs and unfailing accuracy in our courteous and qualified assistants.

Yours respectfully,

R. SIMPSON."

The case was argued on June 15th, 1896, before MEREDITH, C. J., and ROSE, J.

Osler, Q. C., and E. T. Malone, for the prosecutor.

Shepley, Q. C., and M. H. Ludwig, for the defendant, were first called on. Two things are clear from *The Pharmaceutical Society v. London and Provincial Supply Association*, 4 Q. B. D. 313; 5 Q. B. D. 310; 5 App. Cas. 857, (1) that the Act in question was passed solely and only for protection of the public, and not to create a monopoly; (2) that the Act is not to be construed so as to unduly restrain trade. Keeping shop involves the idea of control or managership; it does not involve the idea of ownership at all.

[MEREDITH, C. J.—This is Mr. Simpson's business.]

There is nothing in public policy to prevent any one with money engaging in selling drugs; all that is necessary is that the actual handling of the drugs should be in the hands of a competent person. For the purpose of a penal statute, Mr. Simpson does not keep this shop. It is Simpson's shop, but Simpson is not keeping it: see R. S. O. ch. 151, sec. 29, as amended by 52 Vict. ch. 25, sec. 9. If A., being duly certificated, and B., uncertificated, carry on in partnership a drug business, but A. alone manages it, B. not interfering at all, A. could not be convicted under section 29 above. If so, how could B. be convicted?

[MEREDITH, C. J.—He is keeping an open shop—though he takes no part in it.]

[ROSE, J.—Here's a master who employs a servant and puts him in charge of his store. It is not the case of a partnership.] Argument.

The man who has the whole control and management of the shop, is keeping the shop: *Queen v. Williams*, 10 Mod. 63; *King v. Dixon*, *ib.*, 335; *Regina v. Warren*, 16 O. R. 590; *The Pharmaceutical Society v. Wheeldon*, 24 Q. B. D. 683. See, also, *State v. Norton*, 67 Io. 641.

MEREDITH, C. J.:—

It is not necessary to call on counsel in reply. I have no doubt the defendant did keep an open shop, within the meaning of this section. The profits of the business were his less what he paid Lusk, who was a servant. I do not think one gains much by searching for the spirit of the legislation; when language is plain, it is better to follow it. I rest upon the reasoning in *State v. Norton*, 67 Io. 641, which seems very clear and satisfactory.

It may be as a matter of policy that a case such as this should not be within the Act, but that is for the Legislature.

ROSE, J.:—

We have simply to determine whether the defendant did or did not keep an open shop. Lusk was Simpson's servant, and had to do what he was told. The business was being carried on by the defendant, and the defendant was, in my opinion, keeping an open shop. As to R. S. O. ch. 151, sec. 29, the question there raised is, was an open shop kept? If the defendant was authorized to carry on the business of a chemist and druggist, he was entitled to keep an open shop, otherwise not.

Decision of magistrate reversed and case remitted to him. No costs.

A. F. H. L.

[DIVISIONAL COURT.]

LEE V. ELLIS.

Principal and Surety—Advance to Wife—Charge on Her Estate—Covenant of Husband and Wife—"Ordinary Legal Rights"—Account.

A married woman who, under the terms of her father's will was entitled to receive her share of his estate on coming of age, agreed, on attaining her majority, with the other beneficiaries, to postpone the division. An agreement was afterwards executed between the husband, wife, and the trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys which she agreed to repay within a specified period, the advance being made a charge on her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of nonpayment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in any wise effect or prejudice the ordinary legal rights" of the trustee to enforce payment:—

Held, that, notwithstanding the latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on.

Statement.

THIS was an action by the plaintiff as trustee of Thomas Bell, deceased, to recover from the defendants, husband and wife, the sums, of \$1,500 and \$1,000 with interest on two indentures in which they jointly and severally covenanted with the plaintiff to repay these loans which he had made made to the wife.

The action was tried before BOYD, C., at the non-jury sittings at Toronto on the 18th November, 1895.

The husband's covenants were made by him as surety for the wife, who was the principal debtor.

The instruments in question were dated 3rd October, 1887, and 17th February, 1890, and except as to amounts and dates, were similar in terms; and it is only necessary to refer at length to one of them, which was as follows:—

"This indenture made in duplicate the third day of October, 1887, between Clara Victoria Fanny Ellis (formerly Clara Victoria Fanny Bell), of the city of Toronto, in the county of York, wife of Thomas Danvers Ellis, also of Toronto, of the first part; the said Thomas Danvers Ellis,

commercial traveller, of the second part, and Walter Sutherland Lee, also of Toronto, esquire, trustee of the estate of Thomas Bell, late of the city of Toronto, esquire, deceased, of the third part. Statement.

Whereas under a decree of the Chancery Division of the High Court of Justice pronounced on the tenth day of October, 1883, in a certain action wherein Charles Thomas Bell and others were plaintiffs, and the party of the third part and others were defendants; the party of the first part was declared entitled to receive, so soon as she attained her majority, her share of the estate of the said Thomas Bell, as to which William Houghton Bell now deceased, the father of the party of the first part, did not exercise a power of appointment, together with the arrears of income thereon.

And whereas the said party of the first part has attained her majority, and being now entitled to receive her said share of the said estate, has agreed, with the other parties entitled to share therein, to postpone the period of division of the said estate until such time as may be hereafter determined.

And whereas the said party of the first part desires to obtain an advance out of the said estate amounting to the sum of \$1,500, which is to be repaid as hereinafter provided, which the said party of the third part has agreed to make.

And whereas the party of the second part is made a party hereto for the purpose of joining in the covenants herein contained.

Now this indenture witnesseth that in consideration of the premises and of the sum of \$1,500 now paid to the party of the first part, the receipt whereof is hereby acknowledged, the said parties of the first and second parts do hereby for themselves, their and each of their heirs, executors, administrators and assigns, covenant with the said party of the third part, his executors, administrators, and assigns, that they shall on the fourth day of October, 1890, pay or cause to be paid to the party of the

Statement. third part, his executors, administrators, or assigns, the sum of \$1,500 in gold coin, and, until payment thereof, will pay to him interest on the said sum of \$1,500, or on so much thereof as shall for the time being remain unpaid, at the rate of six per cent. per annum, from the date hereof, by equal half yearly payments on the fifteenth days of April and October, in every year.

And the said party of the first part, doth hereby charge the repayment of the said principal sum and interest upon the said share of the said party of the first part in the said estate, and doth authorize and direct the party of the third part to deduct from the moneys from time to time coming to the party of the first part on account of her said share whatever portions of the said principal sum and interest from time to time remain due and unpaid.

It is expressly understood and agreed by and between the parties hereto, that none of the provisions of this indenture shall in anywise affect or prejudice the ordinary legal rights of the party of the third part to recover and enforce repayment of the said principal sum and interest.

And it is also expressly understood and agreed by and between the parties hereto, that in the event of a division of the said estate, prior to the date provided for repayment of the said principal money, the amount due to the party of the third part, under the provisions of this indenture, at the date of such division, shall be deducted from and charged as a payment on account of the share of the said estate to which the said party of the first part shall be entitled at the date of such division."

Judgment was obtained against the wife by default. The husband set up the defence that the amount was advanced to the wife, and that he was only a surety; that it was never intended that he should be liable if her share of the estate was greater than the amount advanced, which he alleged was the case; and he also alleged that the plaintiff had subsequently advanced large sums to his wife out of the estate.

The trial Judge held that the clause in the instruments

declaring that nothing therein should in anywise "affect Statement. or prejudice the ordinary legal rights" of the plaintiff prevented the husband from setting up the defence that he was a mere surety for his wife, and prevented his claiming that the plaintiff was a trustee, having in his hands securities for moneys held by him in trust for the wife which were sufficient to repay the indebtedness owing by the wife to the plaintiff in respect of the loan, and that he was as such surety entitled in equity to a set-off against the plaintiff's claim in the same way that the wife, as principal debtor, would have been entitled to set off her claim against the plaintiff's claim, had she chosen to do so; and that the instrument in question had expressly given to the plaintiff a charge upon the said trust property in his hands by way of security for the repayment of the said loan, and that the plaintiff had thereafter paid certain of the trust moneys to the wife, whereby he had depreciated his said security to the detriment of the husband in the event of the trust property in hand being insufficient to satisfy the plaintiff's claim, and that the husband was entitled to call the plaintiff to account for the moneys so paid over by him.

The defendant Thomas D. Ellis appealed to the Divisional Court, and the appeal was heard on the 9th day of December, A. D., 1895, before FERGUSON and ROBERTSON, JJ.

Marsh, Q. C., for the defendant, appealing.

Moss, Q. C., for the plaintiff, contra.

April 10th, 1896. FERGUSON, J. :—

The action is upon the covenants contained respectively in the indentures of the 5th day of October, 1887, and the 17th day of February, 1890, the former for the payment of \$1,500 and interest, and the latter for the payment of \$1,000 and interest. The covenants are executed by both defendants who are husband and wife. Each indenture

Judgment. states, by way of recital, the reason why the husband
Ferguson, J. became a party to it, which is "for the purpose of joining
in the covenants herein contained."

The moneys advanced for the repayment of which the covenants were given, were advanced by the plaintiff out of an estate in which the wife had and has an interest. These moneys were advanced to the wife and not to the husband, and each indenture makes the money mentioned in it, and so advanced, a charge upon the share of the wife in the estate, and provides for such money being deducted from her share in case of non-payment; or in case of the distribution of the estate before the respective days for payment.

After a perusal of the documents in evidence, and the evidence given by witnesses at the trial (all the evidence), I am entirely unable to arrive at the conclusion that the husband was the principal debtor; or that the money advanced by the plaintiff was a loan to him, the husband. I think that what is shewn is, that these advances were advances made by the plaintiff, the trustee of the estate, in which the wife had, as aforesaid, an interest, to the wife before the period or time of distribution; the plaintiff, the trustee, taking for his own safety the documents containing these covenants, that is, as a security in respect of his own acts in making the too early advances to the wife; and I think we have no concern here with what the wife may have done with the money after the advances were made to her.

I am of the opinion that the husband executed the covenants sued on as a surety for his wife, and as such surety only.

Stress was laid upon the clause appearing in each of the indentures, whereby it was stated to be expressly understood and agreed by and between the parties that none of the provisions in the instrument should in any way affect or prejudice the ordinary legal rights of the plaintiff to recover and enforce repayment of the principal moneys and interest. The learned trial Judge seems also to have been more or less influenced by the provisions of this clause.

Having read and re-read this clause, and taking it in its ^{Judgment.} setting, I am of the opinion that it cannot have the effect ^{Ferguson, J.} contended for; and that, notwithstanding its existence, the husband is liable only as a surety for his wife. Even if the clause were read by itself and given its widest possible range of meaning, the conclusion would, I think, be the same, for it is not, as I think, affecting or prejudicing ordinary legal rights to say to one holding a document on which a principal and a surety are liable, "you shall recover against them as principal and surety and not otherwise." Then, the defendant, the husband, being liable as surety for his wife only, and the plaintiff having and holding property of the wife, the principal debtor, namely, the share of the estate in his hands belonging to the wife at the respective dates of the covenants sued on as security for the same debt, the husband being called upon to pay according to his suretyship, is entitled to the benefit, so far as needful to reimburse him, and so far as the same may extend, of this property of the principal debtor, the wife, so in the plaintiff's hands; and, I think that there should be a declaration in apt words to this effect; the husband being, as I think, entitled to an account in this regard from the date of the earlier of the two covenants sued on. The defendant, the husband, is entitled to his costs of this appeal.

The husband has, however, another right, viz., to be exonerated by the principal, his wife, as mentioned by Mr. Justice Willes, in *Bechervaise v. Lewis*, L. R. 7 C. P. 372, at p. 377; and should it turn out that the plaintiff has in his hands property of the wife sufficient to meet the claim sued for, the judgment should be for the defendant, the husband, with all costs.

ROBERTSON, J. :—

[The learned Judge, after setting out the pleadings and evidence, proceeded:]

The conclusion I have come to is, that the advances

Judgment. were made to the wife, and not to the husband. Every document in connection with the case proves this to be the fact. **Robertson, J.** The husband joined in the covenants surety, and the several indentures expressly declare that the party of the first part (Mrs. Ellis) desires to obtain an advance out of the said estate, etc., and the repayment of the said several principal sums and interest is expressly charged upon the share of Mrs. Ellis in the said estate, and she doth authorize and direct the party of the third part (that is the trustee), to deduct from the moneys from time to time coming to her on account of her said share, whatever portions of the said principal sum and interest from time to time remain due and unpaid.

It also appears that the trustee has disregarded this authority, and has paid over, out of the moneys in his hands which were payable out of the estate in his hands to Mrs. Ellis, large sums, if not equal to, at all events, somewhat under the amount, and besides he has abundance in his hands to cover the whole advances with interest.

The plaintiff, however, relies on the joint and several covenant of husband and wife to repay the amount, and the expressed agreement in each of the said indentures, that none of the provisions in the instruments shall in anywise affect or prejudice the ordinary legal rights of the party of the third part (the trustee) to recover and enforce repayment of the said principal sums and interest.

As between plaintiff and defendant, Thomas Danvers Ellis, it is clear to my mind that the latter is a mere surety to make good any deficiency there might be in case the share of Mrs. Ellis in the hands of plaintiff should prove insufficient, etc.; but it is clear beyond peradventure that the contrary is the fact; there is abundance to repay the advance. In fact, as an advance, I do not understand that there is any reason why the amount should be called in. These several sums of \$1,500 and \$1,000 are chargeable to Mrs. Ellis, against her share in the said estate, and to make her surety now pay up the amount to be paid over again, would be inequitable. Suppose the plaintiff had in

disregard of the conditions set out in the indentures, paid over to Mrs. Ellis all the money in his hands, which she would be entitled to, and then in order to make good the amount thus paid over to her, that the other beneficiaries might be paid in full, the plaintiff called upon Mr. Ellis to pay over, where would the justice be in such a case as that?

I am dealing with this case exactly as the documentary evidence makes it out. I am not taking into account the fact whether Mr. Ellis received part of the money from his wife or not; in my judgment that is not the question here. The advances were made to Mrs. Ellis, and she disposed of the money as she thought fit; the plaintiff has nothing to do with that, but he has a right, when he is dealing with a surety, as Mr. Ellis clearly was, to take care that he does not prejudice the position of that surety. After all, where is the harm? The plaintiff is perfectly safe; he has only to charge these advances in terms expressed in the indentures to Mrs. Ellis; the funds are her own, and the plaintiff is fully indemnified. I can see no reason for bringing this action at all, unless it was to serve the wife against the husband, but that is repudiated by the plaintiff.

It appears to me the surety has a right to call upon the plaintiff and the principal debtor, Mrs. Ellis, to settle accounts between themselves, before he is called upon to pay. He has an equitable defence; he may plead a special plea of set-off due from the plaintiff to Mrs. Ellis, arising out of this transaction; and he can insist upon those accounts being adjusted between them before he is called upon to pay.

In *Bechervaise v. Lewis*, L. R. 7 C. P. 372, at p. 377, Willes, J., says: "In substance, the plea is a special plea by a surety, of a set-off by the principal, arising out of the same transaction out of which the liability of the surety on the note arose. A surety has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds

Judgment. against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties. The surety, however, has another right, viz., that as soon as his obligation to pay has become absolute, he has a right in equity to be exonerated by his principal. Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him. In this state of things, we are bound to conclude that the surety has a defence in equity against the creditor; and we are justified in doing so by the authority of the civil law, * * to be found in Dig. Lib. xvi. tit. 11, section 4."

I also refer to *The Queen v. Whitehead*, 1 Ex. C. R. 134, at p. 142.

Here the claim of the plaintiff against Mrs. Ellis upon the agreements in question, which create a charge upon her share of the estate of Thomas Bell, and which agreements are made for repayment by her of moneys loaned to her out of that estate, and the claim of Mrs. Ellis against the plaintiff for her share so charged, are connected accounts, debit and credit, which are the subject of set-off without reference to the statutes of set-off.

Mr. Marsh, in his argument, puts the case in this way; and the conclusion he comes to, I agree with, viz.: Supposing the defendant Mrs. Ellis as a *cestui que trust* had brought her action in a court of equity against this plaintiff as trustee, to compel him to account to her and pay over to her the amount of her share in his hands as ascertained by such account taking; could the plaintiff Lee on the taking of this account set off as against Mrs. Ellis the moneys which the plaintiff Lee had advanced to her on the security of that share?

There can be no doubt that he would be entitled to such set-off, and the right of set-off as between the parties must

be mutual, and the same connection between the accounts Judgment. which would enable him to set-off as against her, must Robertson, J. enable her to set-off as against him.

See also "Snell's Equity," 10th ed., p. 620: "Courts of Equity, independently of the statutes of set-off, and by virtue of their general jurisdiction, granted relief in all cases of mutual and independent debts where there was merely a *mutual credit*; that is to say, in all cases where there was an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as the means of discharging it. * * As to equitable debts, or a legal debt on the one side, and an equitable debt on the other, there was great reason to believe that whenever there was a mutual credit between the parties touching such debts, a set-off was upon that ground alone maintainable in equity."

On the whole case, I am of opinion, with great respect, that the judgment of the learned Chancellor should, at least, be varied in order that an account may be taken as to the interest or share of Mrs. Ellis in the estate of the late Thomas Bell in the hands of the plaintiff as trustee, etc. And in case it should be found that there was at the time the several sums of \$1,500 and \$1,000, respectively, became due, or is in the hands of the trustee at any time since the dates of the loans, a sum sufficient belonging to Mrs. Ellis, to meet the advances of \$1,500 and \$1,000, then that this action should be dismissed as against the defendant Thomas Danvers Ellis with costs; and that there should be no reference to the Master to take the accounts between the defendants Thomas D. Ellis and Clara Victoria Fanny Ellis.

G. F. H.

CLARKE V. REID.

Landlord and Tenant—Assignment for Creditors—Landlord's Preferential Lien—58 Vict. ch. 26, sec. 3, sub-secs. 4 and 5 (O.).

Under 58 Vict. ch. 26, sec. 3, sub-secs. 4 and 5 (O.), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but also to three months' rent thereafter, whether the assignee retains possession or not; and in case the assignee elects to retain possession, the lien extends for such further period, over the three months, as the possession lasts.

Statement. THIS was an action claiming an injunction to restrain proceedings under a landlord's warrant.

John Stevenson was a tenant of the defendant Jane Reid, for a term of years under a lease which had expired, but the tenant continued on on the same terms as before. On the 1st of January, 1896, there were two years' rent in arrear, amounting to \$1,200, the rent under the terms of the lease being payable monthly. About the 23rd of January, a distress warrant was placed in the bailiff's hands and a seizure made, but the bailiff continued in possession pending negotiations for settlement, and the goods were not advertised. The settlement fell through, and Stevenson made an assignment to the plaintiff Clarke on the 31st of January, which was not assented to by any of the creditors until the following day, and it did not appear whether those who assented constituted a majority of the whole body of creditors. No tender of rent was made after the assignment. After the assignment, the assignee sent to the defendant through her solicitor, a cheque for one year's rent, which the defendant refused to accept, but notified the plaintiff before the issue of the writ that he would accept the year's rent due previous to the assignment and the three months' rent thereafter, together with the bailiff's fees and expenses. The assignee then commenced this action.

The motion for the injunction came on before the Chancellor on the 4th of February, 1896, at the Weekly Court

at London, when by consent it was turned into a motion Statement for judgment.

W. J. Clarke, for the plaintiff.

M. D. Fraser, for the defendant.

February 7th, 1896. BOYD, C.:—

Two years' rent being in arrear, amounting to \$1,200, the defendant had the right to distrain therefor upon the goods of the tenant Stevenson. After distress he made an assignment for creditors, and thereupon the questions arise between the landlord and the assignee, under 58 Vict. ch. 26, sec. 3, sub-secs. 4 and 5 (O.).

The assignment in this case is not satisfactorily proved. It is not made to the sheriff but to a private assignee, and there is no evidence that the creditors who sign in token of their assent are a majority, so as to bind the whole body of creditors. But assuming that a majority do sign, the instrument, though it bears date 31st January, 1896, would not be legally operative till it was assented to by the creditors so as to affect the distress previously made. The creditors did not sign till the 1st of February, and no tender was made after that.

The prior tender of \$600, assuming it to be made with sufficient formality, was not one which the landlord was bound to accept. By the terms of the statute the preferential lien is restricted to one year's rent, but he is also entitled to rent for the three months following the assignment, whether the possession is kept by the assignee that long or not. The expenses of the seizure were also properly payable before the landlord could be called on to withdraw his bailiff.

I do not read sub-section 5 enabling the assignee to hold for the remainder of the term as detracting from the express declaration of the prior sub-section that the preferential lien shall cover three months' rent after the assignment. This preferential lien may extend for longer, because, as the statute says, it may hold "so long as the

Judgment. assignee shall retain possession," (sub-section 4), *i.e.*, so long
Boyd, C. after the three months as he shall retain, upon making the election, so to do under sub-sec. 5.

The writ of summons issued on 1st February, but before service, the defendant had informed the plaintiff what he would accept (on the footing of there being an assignment), in the letter of that date, viz., the year's rent, plus the three months' rent, plus the bailiff's fees and expenses. This was, I think, the accurate measure of the terms in which the landlord should be required to withdraw from a seizure legally made. There was, therefore, no reason for the action so far as it claims an injunction.

I observe that the notice of motion is dated, and was served on the 31st January (before writ issued), and it is founded on affidavits, of which all but one are sworn on the 3rd February, the exceptional one is sworn on the 1st February. This is a very irregular way of launching motions, and it is only now important as shewing that needless expense was incurred after the defendant had defined his position—a position which entitles him to costs as against the plaintiff.

The main matters were all determined at the hearing, except as to costs: \$600 for the year's rent, \$150 for the three months' rent, and the usual bailiff's fees, etc., on the whole levy for \$1,200, down to the assignment, and after that fees on the lesser sum to be allowed the landlord, and also his costs of defence to be paid by the plaintiff.

G. F. H.

[DIVISIONAL COURT.]

LEITCH V. MOLSON'S BANK.*

Executors and Administrators—Distribution Pari Passu—Action by Administratrix to Recover Excess—Locus Standi—R. S. O. ch. 110, sec. 36.

An administratrix, having given the statutory notice for creditors, after expiry of the time therein mentioned, paid money on a claim, and afterwards, new claims being raised against the estate, sought to recover a portion of the money back as on an overpayment :—
Held, that she had no *locus standi* to maintain the action.

THIS was an action brought by the administratrix of the estate of one D. C. Leitch's against the Molson's Bank, to recover a sum of money paid by her to the defendants under the circumstances fully set out in the judgment of MacMahon, J., before whom the action was tried at St. Thomas, on March 17th, 1896, and who, on March 26th, 1896, delivered judgment as follows :—

MACMAHON, J. :—

D. C. Leitch was one of the guarantors for the payment of any indebtedness due by his brother A. J. Leitch to the Molsons bank. In 1891, A. J. Leitch was owing the bank about \$1,200, and the manager of the bank was pressing for a settlement, and threatening suit unless the account was paid or security given. When A. J. Leitch received that notification from the manager, he communicated it to his brother D. C. Leitch, explaining the position, and D. C. Leitch becoming alarmed at the prospect of being sued, it was then considered what was to be done to avoid what it was deemed by both would be a calamity—a suit against them—and A. J. Leitch suggested that D. C. Leitch should purchase the stock of groceries he (A. J. Leitch) then owned for which D. C. Leitch was to give his notes payable in

* This action was tried in conjunction with an action by the same plaintiff against one Armstrong, to recover back money paid by her, as administratrix, to him as an execution creditor to D. C. Leitch's estate, but it is not necessary to report the facts of that case.

Judgment.
MacMahon,
J.

monthly payments of \$100 each, which as paid, were to be applied towards reducing the indebtedness of A. J. Leitch to the bank, and which would at the same time relieve D. C. Leitch from his obligation on the guarantee. After the sale was completed, and the stock taken possession of by D. C. Leitch, A. J. Leitch communicated with the manager of the bank and offered him ten of the notes taken from D. C. Leitch for the stock as security for his indebtedness to the bank. There was an objection to accepting the notes on the ground that the bank already had D. C. Leitch's guarantee as well as the guarantee of another brother, M. C. Leitch, and the manager was urging for a considerable payment in money. A. J. Leitch then came to St. Thomas bringing the notes or some of them with him, and it was arranged between himself and the manager of the bank, that these notes should be left with the bank as collateral security for A. J. Leitch's indebtedness; and they were so left, being entered up in a book called the "Collection Register," as the notes of D. C. Leitch collateral to the indebtedness of A. J. Leitch.

The evidence discloses that the moneys paid to the bank, were paid out of the proceeds of the stock of goods,—D. C. Leitch having shortly after the stock came into his possession, disposed of it to one McDougall, receiving as a cash payment the sum of \$500. The whole of the moneys paid into the bank with the exception of \$100, were received by the plaintiff as administratrix of D. C. Leitch's estate, from McDougall as part of the purchase money of that stock of goods, and the money was applied (although, as I shall presently point out, there was no express trust created), in accordance with the agreement entered into between A. J. and D. C. Leitch, by which A. J. Leitch was to be relieved from his liability to the bank.

I find that on the 15th of December, 1891, on which date the time expired according to the notice duly published for filing claims against D. C. Leitch's estate,—the administratrix from the claims then filed, properly assumed

that the assets of the estate were ample to pay every creditor, and she was not made aware of the exact condition of the estate till about Christmas, when she was informed that her brother-in-law, A. J. Leitch, had a claim of nearly \$4,000 against her husband's estate, and shortly after that she became aware of the existence of the Penhale claim for about \$1,800, when it became apparent that the estate was insolvent.

Judgment.
MacMahon,
J.

The bank is in the same and in no better position than a man who having the notes of his principal debtor, received these notes as collateral security for his debt, and carried his securities about with him in his pocket-book. As the collateral notes mature, the administratrix of the estate of the maker pays them and they are delivered to her, and as each collateral note is paid, the amount is indorsed on the note of the principal debtor. There could be no recovery back of any of the sums so paid. Such payments would have been made on account of the principal debt for which the collaterals were held, and were as each payment was made and indorsed on the note of the principal debtor, a payment and discharge *pro tanto* of his indebtedness.

The claim of the bank against the principal debtor being satisfied by such payments, A. J. Leitch was released from his liability, the bank could not sue him, and it would be a fraud upon the bank if this plaintiff could recover back the moneys paid under the circumstances stated, and when the principal debtor A. J. Leitch had become insolvent.

But apart from any of the considerations to which I have adverted, the plaintiff cannot recover in this action. As to the first \$800, that was properly paid to the bank, as up to December 15th, when according to the notice, the time for filing claims had expired, the administratrix was under the statute protected in the payment of this sum. But if the bank has been improperly paid more than its *pro rata* share, the plaintiff cannot as administrator succeed in an action to recover the excess so paid. That

Judgment. right is by the R. S. O. ch. 110, sec. 36, reserved to a creditor or claimant: *Chamberlen v. Clark et al.*, 1 O. R. 135, and 9 A. R. 273. See also the notes to *Jervis v. Wolferstans*, Ruling Cases, vol. 2, p. 171.

MacMahon, J.

As to the \$200 paid by the plaintiff after she became aware of the insufficiency of the assets, in the same note to the Ruling Cases, it is said: "The executor or administrator is not entitled to have refunded to him an amount expended in paying a debt of which he had notice when the assets were distributed: *Goodman v. Sayers*, 2 J. & W. 249, at p. 263; *Whittaker v. Kershaw*, 45 Ch. D. 321."

Mr. Robertson, for the defendants, argued that the money which came to the hands of the administratrix from McDougall, was impressed with a trust in favour of A. J. Leitch. That could not be. D. C. Leitch was the absolute purchaser of the stock and gave his notes therefor, which afterwards passed out of the hands of the vendor to the bank as collateral security for A. J. Leitch's indebtedness. The authorities furnished me by Mr. Robertson, therefore, do not apply to this case. The administratrix, however, if she did not regard the moneys received from McDougall as impressed with any trust, apparently regarded it as a moral obligation to carry out the arrangement entered into between her husband and A. J. Leitch, and pay such moneys to the bank. And that this is the way she regarded it, is apparent from her having omitted this claim from the schedule of assets of her husband's estate when applying for administration.

When the estate of D. C. Leitch reached the Master's Office, after an administration order was obtained, it was found the estate was insolvent at the time of Leitch's death.

It is not necessary that I should consider the other questions urged upon me, as according to my view, the plaintiff, for the reasons stated, cannot succeed, and the action must be dismissed with costs.

The plaintiff moved before the Divisional Court by way of appeal from the above judgment and the motion was argued on May 22nd, 1896, before BOYD, C., and FERGUSON, and ROBERTSON, JJ.*

J. A. Robinson, for the plaintiff. The surety was not released, because it was not a valid payment. Payments made in this way under a mistake, do not discharge the surety: *Petty v. Cooke*, L. R. 6 Q. B. 790. Moreover, the plaintiff owed no duty to the Molsons Bank to discover the mistake and to bring it to their notice: *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 234; *Clerk v. Eckroyd*, 12 A. R. 425. The right of a creditor to recover from a creditor who has been over paid, was established by *Chamberlen v. Clark*, 1 O. R. 135, 9 A. R. 273. In *Taylor v. Brodie*, 21 Gr. 607, referred to in *Chamberlen v. Clark*, Blake, V.-C., held that the Master, in administration, could recover back money overpaid, and apply it in course of administration. See also *Jervis v. Wolferstan*, L. R. 18 Eq. 18.

J. S. Robertson, for the Molsons Bank. If the plaintiff has any ground of action, it is against A. J. Leitch, the principal debtor, who got the benefit of the money. The bank was merely custodian of the notes given by D. C. Leitch to A. J. Leitch. The money paid was the proceeds of the sale of A. J. Leitch's stock of goods, to sell which D. C. Leitch was really the agent of A. J. Leitch. It was not the estate's money in any way, and the plaintiff never treated it as such. Moreover, if the plaintiff succeeds, she succeeds in getting the money from the bank to pay A. J. Leitch, who has already appropriated it to pay the bank's claim by depositing the notes with the bank. The relief sought is equitable, and the plaintiff must do equity, and place us back in our old position: *Ridgway v. Newstead*, 30 L. J. Ch. 889; *Blake v. Gale*, 32 Ch. D. 571; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Erlanger v. The New Sombbrero Phosphate Co.*, 3 App. Cas.

*A similar motion was argued at the same time in *Leitch v. Armstrong*.

Argument. 1218, at p. 1279. There seems to be no case holding the administrator can recover back : *Whittaker v. Kershaw*, 45 Ch. D. 231.

Robinson, in reply. The money that is being collected is not going back to A. J. Leitch at all. An executor has the right to recover back over payments, and the policy of the law is to encourage an executor to administer the estate.

June 24th, 1896. **BOYD, C.:**—

The judgment in these cases is right in many aspects. The widow having duly advertised for creditors under the statute, was justified in making payments as on a solvent estate. There was no mistake at this point; the claims which afterwards came in, did not invalidate the prior action; the estate was discharged though the creditors coming in after the statutory period, may have the right to follow the payment to these defendants if so advised. Again, the fair tenour of the evidence is, that the payments were made to the bank in recognition of the arrangement between the testator and his brother that the moneys derived from the sale of the goods, should be applied to pay the bank's claim and exonerate A. J. Leitch. Now be it noted that it is the claim of A. J. Leitch brought in after the statutory period which is used to make the estate insolvent. And it would be most inequitable to use this leverage to recall a payment which was made in pursuance of the arrangement by which A. J. Leitch turned over the goods to the testator to be sold and applied for his (A. J. Leitch's) benefit.

FERGUSON, J.:—

These are appeals from the judgments of my brother MacMahon. The appeals were argued together, though there were some differences in the cases.

I have perused the evidence and followed out the

contentions of counsel and examined all the authorities ^{Judgment.} referred to by them respectively, without being able to ^{Ferguson, J.} discover any reason sufficient to disturb the conclusions arrived at by the learned trial Judge; and I fully agree in the conclusion of the Chancellor in respect of these appeals, namely: that they and each of them should be dismissed with costs.

This is in entire accord with the opinion I had at the close of the arguments.

ROBERTSON, J., concurred.

A. H. F. L.

McCULLOUGH V. NEWLOVE.

Interest—Work and Services—Reference—58 Vict. ch. 12, sec. 118 (O.).

On a reference in an action in which money is claimed for work and services agreed to be paid for at a fixed rate, the referee may under 58 Vict. ch. 12, sec. 118 (O.), allow interest on the amounts claimed from the times they became payable.

THIS was an appeal from the report of an official ^{Statement.} referee, to whom an action brought by the plaintiff against the defendant personally as well as executor of Robert Weston Newlove, had been referred.

The plaintiff was hired as a servant over thirty years before the commencement of the action by one Hannah Newlove, who with her three sons were joint devisees under her husband's will of his real and personal estate, and continued as a hired servant down to April, 1895, as set out in the judgment.

The referee found that the plaintiff was entitled to recover from the defendant personally, the sum of \$7.50, moneys which the defendant had taken belonging to the plaintiff; and as executor of Robert Newlove, deceased, the sum of \$5 per month for wages, from the 1st December, 1877, to the 17th day of April, 1895; but that she had been paid on account of said wages, certain sums amounting to

Statement. \$30 per annum ; leaving a balance due her of \$518.75 ; and that she was entitled to interest on the balance due her at the end of each year to the date of his report, with interest also on the sum of \$7.50, making the sum due for interest \$289.75, and the total amount due her \$816.

From this report, the defendant appealed on the ground, amongst others, that no interest should have been allowed.

On April 30th, 1896, *S. H. Blake*, Q. C., and *W. H. Blake*, supported the appeal. No interest should have been allowed : 58 Vict. ch. 12, secs. 118-120 (O.) ; *Re Ross*, 29 Gr. 385, 388-390 ; *Turner v. Burkinshaw*, L. R. 2 Ch. 488-492 ; *Inglis v. Wellington Hotel Co.*, 29 C. P. 387, 393 ; *Davis v. Gorton*, 16 N. Y. (Ct. App.) 255.

Watson, Q. C., contra. The matters are entirely questions of fact. There might be a question arising under the Statute of Limitations, but this is really a question of fact also, and was found by the referee against the defendant. The evidence discloses that the plaintiff was in the employment of the defendant in the capacity of a hired woman, and that she was entitled to the wages claimed by her. This was a matter of fact for the referee on the evidence, and he has found for the plaintiff. The Statute of Limitations does not apply. The evidence shews that the payments were made on account of the indebtedness, and this is sufficient to prevent the statute from running. The referee stood in the same position as a jury, who could properly have allowed interest. He heard the evidence and had the benefit of seeing the parties and witnesses, and there is evidence to support his findings, and therefore they should not be interfered with : *Colonial Securities Trust Co. (Ltd.) v. Massey*, [1896] 1 Q. B. 38.

May 18th, 1896. ARMOUR, C. J. :—

[After setting out the facts and findings of the referee.]

It being found that there was an agreement made by the devisee Hannah with the plaintiff that the plaintiff

and that she continued to be, after the death of the devisee ^{Judgment.} Hannah, the servant of the devisees, Robert Wesley and ^{Armour, C.J.} James Harvey, on the same terms; and after the death of the devisee Robert Wesley, the servant of the devisee James Harvey, on the same terms, I think that the referee properly found that the moneys from time to time paid to the plaintiff, were part payments sufficient to take the case out of the Statute of Limitations, for I think that these payments from time to time made, were made on account of a debt; that they were made on account of the debt for which this action was brought, and that they were made as part payments of a greater debt: *Tippets v. Heane*, 1 Cr. M. & R. 252; *Evans v. Davies*, 4 A. & E. 840; *Burn v. Boulton*, 2 C. B. 476.

The question next arises whether the referee was wrong in allowing interest, and this depends upon the question whether a jury might have allowed interest under the like circumstances.

By the Imperial Act, 3 & 4 Will. IV. ch. 42, sec. 28, it is provided, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue or on any inquisition of damages may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law."

By the Act of the Parliament of Upper Canada, 7 Will. IV. ch. 3, sec. 20, it is provided, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue or on any assessment of damages may, if they shall think fit, allow interest to the creditor from the time when such debts or sums certain

Judgment. were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow interest."

This last enactment differs from the prior enactment in providing that interest shall be payable in all cases in which it has been usual for a jury to allow interest; and this provision has been carried down by succeeding legislation to the Act 58 Vict. ch. 12, sec. 118, which provides that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it."

The case law in England on the subject of interest has no bearing, therefore, on this provision that interest shall be payable in all cases in which it has been usual for a jury to allow it, and there is no case in this country of which I am aware in which this provision has been discussed, except the recent case of *McCullough v. Clemow*, 26 O. R. 467.

Judging from my own experience, I may say that I think it has been usual to tell juries in cases where money is claimed under what were formerly called the common counts, that they might give interest from the time when the money claimed became payable, and that juries have usually given it.

And I think that had this case been tried by a jury, they might have been properly told that they might give interest upon the moneys claimed by the plaintiff from the time when in their opinion they became payable.

The referee has found that the wages claimed by the plaintiff, were payable yearly, and has given interest from the time when they thus became payable; and I cannot say that he was wrong in so doing.

The appeal will, therefore, be dismissed with costs.

G. F. H.

SEYFANG V. MANN.

Chose in Action—Assignment of—Set-off.

By an agreement for the dissolution of a firm, it was provided that all claims and demands, notes, bills and book accounts belonging to the firm were to be collected by the plaintiffs, who were to be the owners thereof, and by virtue of which the plaintiffs sued defendant for a balance alleged to be due for goods sold and delivered by the firm to defendant, who set up a claim for damages for non-delivery of goods by the firm which arose before the dissolution of the partnership:—

Held, a valid assignment of a debt due by defendant to the plaintiffs; and that the defendants could set-off the claim for damages arising by reason of a breach of the agreement under which the debt arose.

The difference between the Imperial and Ontario Choses in Action Act referred to.

THIS was an action tried before Armour, C. J., without Statement. a jury, at London, at the Spring Assizes of 1896.

The plaintiffs claimed as assignees of a firm of Gibson & Prentiss to recover a balance of \$201.50, alleged to be due on the sale of a number of bicycles to the defendant during the months of March, April and May, 1895; and also for the sums of \$123.75 and \$150.00 due for bicycles sold on the 19th and 21st of June, respectively, and \$11.03 for bicycle sundries, delivered during the months of July, August and September.

The alleged assignment was by virtue of an agreement, dated the 23rd of July, 1895, made between John H. Gibson and Andrew L. Prentiss, composing the firm of Gibson & Prentiss, whereby the partnership was "dissolved and terminated by mutual consent, and each of the parties hereto releases and discharges the other of and from any and all liability and obligation growing out of or in any wise connected with the said firm's business heretofore carried on by them under such firm name; it being understood that all claims and demands, notes, bills and book accounts belonging to said firm above mentioned, belong to and will be collected by George Seyfang and Andrew L. Prentiss, who are the owners thereof."

The defence was that by virtue of a written agreement entered into on the 18th of June, 1895, between

Statement. the firm of Gibson & Prentiss and the defendant the said firm agreed to supply the defendant with one hundred and fifty 1895 Bison bicycles, to be shipped as ordered with a reasonable degree of promptitude during 1895, at the prices mentioned in the agreement; and that, though the defendant during the season of 1895 had ordered various shipments of bicycles, the said firm of Gibson & Prentiss, with the exception of the delivery of a small number thereof, had refused and neglected to deliver the same, whereby the defendant was damnified; and also that by the terms of the agreement, in consideration of the performance thereof, the defendant agreed to waive a claim for damages arising prior to the 18th of June, 1895, which he now claimed to set up; and that by virtue of the agreement of the 23rd July the plaintiffs were liable for the damages thus sustained by the defendant; and he counterclaimed therefor.

*Aylesworth, Q. C., and H. Cronyn, for the plaintiffs.
I. F. Hellmuth, and C. H. Ivey, for the defendants.*

May 20, 1896. ARMOUR, C. J.:—

The plaintiffs are entitled to recover the following sums as claimed in their statement of claim: (1) The sum of \$201.50, with interest from the 12th day of July, 1895; the sum of \$273.75 and interest from the 1st day of August, 1895; and the sum of \$11.03 and interest from the 1st day of November, 1895, until judgment.

The defendant is entitled to recover damages for the breach of the agreement of the 18th June, 1895, by reason of the non-delivery of the bicycles thereby agreed to be delivered, as I find that there was no such conduct on the part of the defendant as amounted to a renunciation—to an absolute refusal to perform the contract, as would have amounted to a rescission if he had the power to rescind, and which the plaintiffs might accept as a reason for not

performing the contract on their part, according to the ^{Judgment.} rule laid down in *Mersey Steel and Iron Co. v. Naylor*, *Armour, C.J.* 9 App. Cas. 434. See also *Boyd v. Sullivan*, 15 O. R. 492; *Midland R. W. Co. v. Ontario Rolling Mills*, 10 A. R. 677.

And I find that the damages sustained by the defendant by reason of the breach of the said agreement, amount to \$2,530.

This agreement was made by the defendant with Gibson & Prentiss, who dissolved partnership on the 23rd July, 1895, and gave notice thereof to the defendant on or shortly after the 25th July, 1895, by the agreement of dissolution, it being provided "that all claims and demands, notes, bills, and book accounts belonging to said firm above mentioned, belong to and will be collected by George Seyfang and Andrew L. Prentiss, who are the owners thereof."

And the question arises whether the damages above assessed can be recovered against these plaintiffs, the assignees of the claims of Gibson & Prentiss against the defendant, and if so, to what extent.

In *Exchange Bank v. Stinson*, 32 C. P. 158, Osler, J., points out the difference in the language of the Imperial Act relating to choses in action, and the assignment of them and our Act, and shews that our Act "is more favourable to the debtor, for its effect is to preserve to him, not only all equities to which the claim assigned was subject, but also any legal set-off, whether connected with or arising out of the debt assigned or not, which he had against the assignor at the time of notice of the assignment. Anything which the debtor could avail himself of as an equitable set-off to the debt assigned would be a defence to which, under our Act, the assignment would be subject": *Young v. Kitchin*, 3 Ex. D. 127; *Government of Newfoundland v. Newfoundland R. W. Co.*, 13 App. Cas. 199.

The provision in our Act being that the transfer shall be subject to any defence or set-off in respect of the whole or any part of the claim assigned as existed at the time of

Judgment. or before notice of the assignment to the debtor or other person sought to be made liable in the same manner and to the same extent, as such defence would be effectual in case there had been no assignment thereof, and such defence or set-off shall apply as between the debtor and any assignor of the debt or chose in action.

It seems to me that the defendant is entitled to recover the whole of the damages above assessed against these plaintiffs.

Judgment will, therefore, be for the plaintiffs against the defendant for the sums above mentioned with costs; and for the defendant against the plaintiffs for the damages so assessed with costs, each recovery to be set-off against the other, and the defendant to recover the balance against the plaintiff.

G. F. H.

POCOCK V. THE CORPORATION OF THE CITY OF TORONTO.

FERRIER V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal Corporations—Licenses—Petty Chapman—Ultra Vires—Damages.

A municipal corporation, whose existence is derived solely from the statute creating it, is not liable for damages arising out of the enforcement of a by-law passed under a misconstruction of its powers, unless such liability is expressly or impliedly imposed by statute.

A city corporation acting in excess of its powers passed a by-law amending an existing by-law for licensing pedlars, prohibiting them from peddling on certain streets, and the officers of the corporation in carrying out the by-law declined to issue licenses except in the restricted form, which the plaintiff refused to accept, and, while attempting to peddle without a license, he was interfered with by the police, over whom the corporation had no control :—

Held, that the corporation were not liable therefor.

Nor does any liability arise where a licensee, who takes out a license under such a by-law, in the restricted form, is damaged by being prevented by the police from peddling on prohibited streets.

THE first of these actions was tried before MACMAHON, *Statement*. J., without a jury, at Toronto, on the 3rd and 4th of March, 1896.

The plaintiff in his statement of claim alleged that he was a hawker and pedlar, and a ratepayer in the city of Toronto, and that prior to the 26th of October, 1891, there was in force in the city a by-law numbered 2453, paragraph 12, sub-section 2, of which enacted that licenses should be taken out by "all hawkers, petty chapmen, or others carrying on petty trades, or who go from place to place, or to other men's houses on foot, or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carry goods, wares or merchandise for sale." And that on the 26th of October, 1891, said by-law was amended by by-law numbered 2934, by adding to the above in part recited section, the following sub-section: "2 (a). No person named or specified in sub-section 2 of this section (whether a licensee or not) shall after the 1st day of July, 1892, prosecute his calling or trade in any of

Statement. the following streets, or portions of streets, in the city of Toronto." (Eight streets and parts of streets were mentioned.)

The plaintiff also alleged that the defendants required as a condition of the issuing of a license for peddling, that licensees should agree not to peddle upon the prohibited streets, and that the licenses issued by the defendants' inspector of licenses embodied such restrictions. And that the plaintiff applied for a license which should not contain the restrictions imposed by the said by-law, but the defendants refused to issue a license except as amended by by-law 2934. And also that the said portion of by-law 2934, above set out in amendment of by-law 2453, was at the instance of William Virgo, quashed as illegal by the judgment of the Supreme Court, which judgment was, on the 16th of November, 1895, affirmed by the Judicial Committee of the Privy Council.

It was charged that the corporation enforced the said by-law as amended, by the officers of their license department, and by their police officers, and caused persons offending against the provisions thereof, and those carrying on business without the license thereby required, to be prosecuted and convicted for infraction thereof.

It was also alleged that up to the date of the passing of the by-law containing said restrictions, plaintiff carried on a large and lucrative business in peddling fish, fruit and vegetables upon the streets, or portions of the streets named therein, but owing to the passing and enforcement by the defendants of the said by-law, and their refusal to grant the plaintiff a license for the whole city, his business was greatly damaged, and he had practically to discontinue it.

Du Vernet, for the plaintiff.

Fullerton, Q. C., and *H. L. Drayton*, for the defendants.

May 11th, 1896. *MACMAHON*, J.:—

By the amendment created by by-law 2934, the corporation, instead of regulating the traffic by hucksters and

pedlars, misconstrued its powers and passed a prohibitory enactment. But "a municipal corporation is not liable to a private individual for losses caused by its having misconstrued the extent of its powers, and issued a license which it had no authority to grant": Dillon on Municipal Corporations (4th ed.), sec. 953, citing *Fowle v. Common Council of Alexandria*, 3 Pet. 398. And to that section is appended the following note: "Nor is a municipal corporation liable for the act of its council in erroneously, but without any corruption or malice, refusing to grant a retail license, by mistake supposing it had discretion over the subject, when in fact it had none. The exemption from liability is placed by the Court upon the ground that such functions are substantially judicial in their nature": *Duke v. Mayor, etc., of Rome*, 20 Georgia 635; *White v. Corporation of Yazoo City*, 27 Miss. 357.

Judgment.
MacMahon,
J.

And Tiedeman on Municipal Corporations, section 324 thus treats of the liability of municipal corporations for torts: "Municipal corporations are the creatures of statute, and the powers which they possess, and the duties which they perform, are in the majority of cases wholly imposed and defined by the statute law. It is therefore a cardinal rule, that in every case the liability of a body created by statute, must be determined upon a true construction of the statute, by which it is created. When express statutory provisions declare the corporation to be liable for a tortious act, or for failure to act, the question is simply one of degree. * * But when there is no express or implied municipal statutory liability for tort, and a plain municipal duty has been violated with a consequent damage to some one's person or property, there is no general rule by which it can be decided in every case whether a civil action will lie."

The law being, as I conceive it is, properly stated in the authorities to which I have referred, that a corporation is not liable in damages for having in the passing of a by-law misconstrued its powers, unless a duty is defined and imposed, and a liability of the corporation is created by

Judgment. the statute, the city cannot be made liable here. And it
MacMahon, was admitted by Mr. DuVernet that unless he could suc-
J. cessfully invoke the aid of section 338 of the Municipal
Act, his client could not succeed.

That section reads: "In case a by-law, order or resolution is illegal, in whole or in part, and in case anything has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order or resolution has been quashed or repealed, nor until one month's notice in writing, of the intention to bring the action, has been given to the corporation, and every such action, shall be brought against the corporation alone, and not against any person acting under the by-law, order or resolution: R. S. O. ch. 184, sec. 338."

The effect of this section was considered by Sir J. B. Robinson, in *Black v. White*, 18 U. C. R. 362, at p. 369, where he says: "The plaintiff * * shews us very plainly that he is charging the defendants with being trespassers by reason of the illegality of a by-law, which, if it were free from objection, would shew that he had no cause of action; and yet, he does not traverse the statement in the defendants' pleas that the by-law has never been repealed or quashed. This being so, we have to consider whether the 201st clause" (now section 338) "is not fatal to his action, and that depends upon whether the action can fairly be said to be brought against the defendants for any thing 'done under the by-law.' In other words, must those words be held to mean only anything done in the execution of the by-law, or for the purpose of carrying it out; or should they not be construed to mean also anything done in reliance on the legality of the by-law, as in this case entering upon land which, if the by-law be valid, was a public highway, but which, if the by-law be not valid, leaves the defendants exposed to be treated as trespassers? The case seems to me to turn upon that point, and certainly, unless the latter construction can be adopted, the Act will in this respect, fail in many cases of the effect which I think must have been intended."

Whichever of the above constructions is adopted, nothing was "done under the by-law" by the corporation affecting the defendant. And in order that advantage may be taken of that section, the act or thing done, must be at the instance or under the authority of the corporation against the plaintiff. The corporation cannot be held liable for the acts of a stranger.

Judgment.
MacMahon,
J.

It is true that the plaintiff while peddling, was ordered off the prohibited streets by members of the police force. The police had no instructions from the corporation to so act, and without direct authority from the corporation, they are not its officers or agents.

In *Kelly v. Archibald*, 26 O. R. 608, the Chancellor in giving the judgment of the Chancery Divisional Court, said, at p. 623: "The plaintiffs must rest their claim upon ratification by the city of the alleged illegal act of the police officers, for these latter are not officers or agents of the corporation, but are independently appointed by the board of police commissioners, as an agency of good government, for the benefit of the municipality. Now, the only act of ratification is the resolution to defend, and this, in my judgment, falls far short of what would be needed to implicate the city as pecuniarily responsible for the alleged misconduct of the police officer. These officers were acting in assumed vindication of the city by-laws, and, it may be, under the direction of the mayor who was also one of the board of police commissioners; but there is nothing to shew any adoption of the act of the officers by the city council, so as to fix the corporation with the consequences of that act. As the mayor directed and the officers acted, the executive committee may have been willing to undertake the expense of litigation (whether legitimately or not is not now under consideration), but something more is needed to shew ratification of the transaction as a whole. Nor should it be left, in my opinion, to the jury in such a case as this to infer from the circumstances such as we find them, whether or not there was an adoption of the whole transaction by the municipal corporation. In *Perley v. Inhabitants of*

Judgment. *Georgetown*, 7 Gray 464, it was held that a town does not ratify a collector's illegal acts though it makes payments connected with those illegal acts, because their intervention was doubtless made for a very different purpose than that of ratifying or justifying the acts of the collector. That was followed and applied in *Buttrick v. City of Lowell*, 1 Allen 174, to a case like the present of employing counsel to defend the alleged trespasser. In this case the corporation had no interest in the enforcement of the by-law, other than that which was common to the whole community. Their desire in defending, cannot be carried higher, upon the evidence before us, than that they desired to encourage officers whose business required them to enforce police regulations. But it by no means follows in the case of governmental bodies such as municipal corporations that the intention was to shoulder all civil liability which might result to the officer from illegal or violent acts: see *Sheldon v. Village of Kalamazoo*, 24 Mich. 384; *Trammel v. Town of Russellville*, 34 Ark. 105; *McKay v. City of Buffalo*, 9 Hun 401, 407; and *Eastern Counties R. W. Co. v. Broom*, 6 Ex. 314; *Roe v. Birkenhead, etc., R. W. Co.*, 7 Ex. 36."

The plaintiff did not take out a license, and there was no legal tender by him of the amount required to pay for a license or for the fifty licenses which he said he was authorized by the members of the Pedlars' Association to procure for them. But I find that the plaintiff was informed by the corporation inspector that no license would be issued unless embodying the restrictions against peddling on the prohibited streets.

The action must be dismissed, but I think I will be exercising a proper discretion in dismissing it without costs.

The case of *Ferrier v. Corporation of the City of Toronto* was tried at the same time as *Pocock v. Corporation of the City of Toronto*—the difference being that in this case Ferrier was a licensed pedlar.

The same counsel appeared.

May 11th, 1896. MACMAHON, J.:—

Judgment.

MacMahon,
J.

The only difference between this and the *Pocock* case is that Ferrier was a licensed pedlar and Pocock was not.

For the year commencing on the 1st of July, 1892, and ending on the 30th of June, 1893, Ferrier produced a receipt for the licenses he procured but stated that the licenses had been destroyed. For the year 1893-94 he obtained a license for himself and one for John Cowan, who acted as his agent in peddling.

The plaintiff accepted all these licenses containing a restriction that the business of a hawker or pedlar was not to be carried on in the streets prohibited by by-law 2934.

George Carson, in whose name a license was taken out by the plaintiff and who acted as a pedlar for the plaintiff from the 1st of July, 1892, to the middle of the following September, said he had during that time been summoned many times on informations laid by the police for peddling on the prohibited streets.

Neither the plaintiff nor those employed by him and in whose names he procured licenses to be issued were ever prosecuted by the agents of the corporation, the license inspectors; and if the corporation can be made liable by reason of section 338, it can only be by reason of some act done under the by-law by some one authorized to act thereunder on its behalf. And I simply repeat here what I said in the *Pocock* case.

The action will be dismissed without prejudice to the plaintiff's right to sue, if so advised in the Division Court, to recover the amount of the license fee said to have been paid by him to Mr. Austin, one of the inspectors, under compulsion of threatened proceedings, for carrying on the business of a pedlar without a license.

There will be no costs.

G. F. H.

RE BEATTY AND FINLAYSON.

Execution—Free Grant Lands—Debt Incurred before Location—Devisee—Sale.

An execution against the lands of a patentee under the Free Grants and Homesteads Act, R. S. O. ch. 25, on a judgment obtained for a debt incurred before location of the lands, does not operate as a charge against the lands when sold by his devisee, even after the expiry of twenty years from the date of the location.

Statement. THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112.

The vendors were executors and devisees in trust under the will of one John McNair Finlayson, who was in his lifetime the patentee in fee of certain lands under The Free Grants and Homesteads Act, R. S. O. ch. 25, and they had contracted to sell them to one Mary Finlayson.

Sub-section 2 of the said Act is as follows:—

(2) After the issuing of the patent for any land, and while the land or any part thereof, or interest therein, is owned by the locatee or his widow, heirs or devisees, such land, part or interest, shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for payment of debts, and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period, save and except a debt secured by a valid mortgage or pledge of the land made subsequently to the issuing of the patent.

In making title it was discovered that a writ of *fi. fa.* lands on a judgment recovered against John McNair Finlayson in respect of a debt incurred before he had located the lands, was in the sheriff's hands, and the question was, whether such writ attached upon the lands.

The petition was argued in Court on June 11th, 1896, before MEREDITH, J.

H. E. Stone, for the vendors. The writ does not attach. The twenty years provided for by sub-section 2 of section

20 of the Free Grant Act have elapsed. But the second part of that sub-section provides that the lands "shall not be or become liable" at any time while they are "owned by the locatee or his widow, heirs or devisees." The vendors are devisees under the will of the locatee, and the liability was incurred before location. Even if sub-section 2 does not go far enough, sub-section 1 is sufficient, as the debt was "incurred by the locatee * * before the issuing of the patent" and the land cannot "in any event" become liable for it. Statement.

John D. Spence, for the purchaser. The wording of both sub-sections of section 20 is ambiguous. Sub-section 1 only protects the lands prior to the issue of the patent; and therefore does not apply. The first clause of sub-section 2 (ending with the word "debts" in the sixth line), exempts the lands for twenty years only from the date of location; and here the twenty years have already elapsed. The words "during the twenty years next after the date of the location," may be held to apply also to the second clause of sub-section 2. It may be argued that the effect of the whole sub-section is not only to protect the lands from involuntary alienation at the instance of a creditor, but also to preserve to an execution creditor a lien, which attaches in case of transfer of the title to any person other than the locatee's "widow, heirs or devisees."

Further; Is the vendor's lien attaching until the purchase money is paid, say a moment, such an interest as is exempt? A mortgage for part of the purchase money does not come within the protection of the statute: *Cann v. Knott*, 19 O. R. 422.

MEREDITH, J.—(At the close of the argument.)

The only question raised upon this application is:—Is the land liable to an execution on a judgment recovered upon a debt incurred before it was first acquired under the Free Grants and Homesteads Act; the patent having issued?

That depends upon section 20 of the Act, which is

Judgment. divided into two parts, the first seeming to apply to
Meredith, J. cases where the land is yet held under a locatee's rights only, the words "land located as aforesaid" seeming to mean "held under the provisions of the Act before patent issued"; the other part expressly applying only after the issuing of the patent; the two parts thus covering all cases, and without overlapping one another.

In this case the patent has been granted, and so the first part of the section seems inapplicable; but the latter words of the second part of the section seem to be quite applicable to it, the former words of the second part being inapplicable because the twenty years referred to in them have elapsed.

The latter words of the second part of the section are, "and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period" (twenty years next after the date of the location), "save and except a debt secured by a valid mortgage or pledge of the land made subsequently to the issuing of the patent." Their operation is not limited to the period of twenty years next after the date of the location, but extends to debts contracted and liabilities incurred before, as well as during, that period.

The execution in question is in respect of a debt incurred "before that period," and so the case is quite within the words of the statute.

The object of the enactment may have been to save the land to the occupier, and not to provide any exemption after it has been sold by, or passed out of, the hands of the locatee or patentee, "his widow, heirs or devisees," and a new right in it has been acquired by him, her, or them; but effect must be given to its plain words, and they exempt this land from liability to the debt in question; and being thus made exempt from that debt, how and when can it be said the exemption has ceased; how and when held that the protection ceased, or some other liability attached?

The protection afforded may be wider than the purposes of the Act may have really required; but the Legislature has seen fit to effect its purposes in that way, and effect must be given to its methods, indicated by the words used. Judgment.
Meredith, J

In my opinion the land in question was not "liable to the satisfaction" of the debt in question, and the execution in question, sued out to enforce payment of it, does not stand in the way of the vendors conveying the land free from incumbrances.

Whether the judgment creditor can in any way reach the purchase money, is not a question raised on this application, or with which the parties appear to be at present concerned.

G. A. B.

VANTASSELL v. FREDERICK ET AL.

Will—Construction—Devise—Estate—Defeasible Fee—"Die without Issue"—Share.

A testator, dying in 1833, by his will, made in the previous year, gave to his two sons, after a life estate to his wife, certain lands, *habendum* to his two sons "as tenants in common, their heirs and assigns forever, subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property and conveyed it as in fee simple to the purchaser, who failed to observe the provisions of the Act as to entails by registering his conveyance within six months:—

Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to an indefinite failure of descendants, the context was sufficient to restrict the interpretation.

Roe d. Sheers v. Jeffery, 7 T. R. 589, and *Greenwood v. Verdon*, 1 K. & J. 74, followed.

Chadock v. Cowley, 3 Cro. Jac. 695, distinguished.

Little v. Billings, 27 Gr. at p. 357, commented on.

Statement.

THIS was an action for the recovery of land, tried before BOYD, C., without a jury, at Picton, on the 21st April, 1896. The facts are stated in the judgment.

Deroche, Q.C., and *Aylesworth*, Q.C., for the plaintiff.

O'Flynn, for the defendant Frederick.

W. N. Ponton, for the defendants the Hastings Loan Co.

May 4, 1896. BOYD, C.:—

The land in dispute was owned by Henry VanTassell, who made his will on the 4th July, 1832, and died in the year after. He left a will by which, after a life estate to his wife, he thus deals with the land:—"I give and bequeath to my beloved sons Francis and John, to be by them possessed and enjoyed after the termination of my wife's right as aforesaid, the east equal half of lot number sixty-two in the second concession of Ameliasburgh aforesaid, containing by admeasurement one hundred acres be the same more or less, together with all and singular the hereditaments, appurtenances, and improvements of every

nature and kind thereto belonging, to have and to hold the same to the said Francis VanTassell and John VanTassell, as tenants in common, their heirs and assigns forever: subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise."

Judgment.

Boyd, C.

John, the son, died in 1843, unmarried and apparently out of his mind. Francis, the son, married and had children, and in 1847 sold the whole property as in fee simple to Martin Frederick for its full value. The place was afterwards mortgaged to the Hastings Loan Company to secure \$2,000. The defendant Frederick is son of the purchaser, and the plaintiff is the eldest son of Francis VanTassell, who claims the land as being tenant in tail under the above will.

Martin Frederick, thinking he had bought the fee simple, did not observe the provisions of the Act as to entails, and failed to register his conveyance from Francis VanTassell within six months after the execution thereof (see R. S. O. ch. 103, sec. 30). Hence this action, which turns upon the construction of the passage cited from VanTassell's will.

The plaintiff's father died on 11th March, 1886, but he brings his action in time to save being barred by the Statute of Limitation. It is not a case in which one is disposed to help the plaintiff, unless obliged to do so.

The usual difficulty arises in dealing with the technical formula used by the testator as to "dying without issue," as under the old law. Light is to be sought under the latter rather than the earlier decisions, when the genius of technicality dominated the Courts. It is pointed out by Mr. Jarman in his first edition that since Mr. Fearn's treatise the tendency of decision has been in favour of reverting to the popular as distinguished from the legal meaning of this phrase, by force of a context which in the earlier period would not have been considered as authorizing it. (On Wills, 1st ed., vol. 2, p. 427.)

After much consideration, the better view of this will

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to me appears to be in favour of a defeasible fee, which in the event became absolute in the grantor, Francis Van-Tassell. Starting with the proposition that the words "die without issue" point to an indefinite failure of descendants, the inquiry is whether the context is sufficient by expression or by fair implication of meaning to modify that interpretation as not being consonant to the whole text of the will.

Now the first words of the devise shew unmistakably that the fee simple was being given to the two sons, and that negatives any intention to die intestate as to part of the estate so given. If the latter words "die without issue" reduce this to an estate tail, then, if both sons were to die without descendants, there is found no disposal of the ultimate fee, which would go as on an intestacy. But, again, it is noted by Mr. Jarman that when the preceding devisee would take the fee, the convenience is all on the side of the restricted construction, which renders such fee defeasible on his not leaving issue at his death, and places the estate out of the power of the first taker, who might, if he were tenant in tail (as he would be if the words were construed to mean an indefinite failure of issue), defeat the ulterior estate by means of an inrolled conveyance. To prevent this consequence, the Courts have generally, in such cases, lent a willing ear to the arguments in favour of the restricted (which we have seen to be also the popular) interpretation of these words: Jarman on Wills, 1st ed., vol. 2, p. 440.

The principle of the decision in *Roe d. Sheers v. Jeffery*, 7 T. R. 589, applies here. It is sometimes loosely said that this case is overruled; I do not find it to be so. It is authority for this, that where the ulterior limitations are all for life only to persons *in esse* at the death of the first taker, then the proper inference is that the failure of issue is to be at the death of the first devisee: see Tudor, L. C. Real Property, 3rd ed., p. 688; Watson's Comp. of Eq., 2nd ed., vol. 2, p. 1397. See also *Glover v. Monckton*, 3 Bing. 13; *Peyton v. Lambert*, 8 Ir. C. L. R. at p. 308.

Here, if the language of the testator is regarded, he gives to the ulterior devisee either the fee simple or a life estate only. The will was made before the statutory provision that a devise of land shall be taken to carry as large an estate as the testator had, unless a contrary intention be expressed (4 Wm. IV. ch. 1, sec. 20, 1834). Now, what is given to the son who survives the death of the other without issue is the share of his brother. If the word "share" simply identifies the parcel of land, it is not enough to carry more than a life estate in the land: *Hill v. Brown*, [1894] A. C. 125; *Pettywood v. Cook*, Cro. Eliz. 52. The son as a person is to take with no words of limitation added. That is the important thing to regard, just what the testator has said. I deprecate the method of construction used in *Little v. Billings*, 27 Gr. at p. 357, whereby the operation of a statute is introduced in order to give an extended meaning of the word "children" used by the testator; so that it is read as if he had written "children and their heirs." But, as stated in *Wilson v. Chesnut*, Ir. R. 1 Eq. at p. 566 (1868), "the question depends, not on the quantum of interest in the gift over, but on the intention of the testator to point to an enjoyment of the gift over, by a living person." And to like effect in *Jarman*, 4th ed., vol. 2, pp. 527, 528: "It is the fact that representatives are mentioned, rather than the effect produced, which creates the distinction; since the restricted construction has prevailed in many cases where such survivor has taken a transmissible interest."

But if "share" means not only the particular land, but the particular estate in the land, then it must mean, as used by the testator, the fee simple given by the first words of disposition. In this aspect of construction, note that he repeats the reference to quality of the estate by saying "his share as aforesaid" and "the aforesaid devise."

But again, I think the whole context of the will indicates such an intention as appeared in *Greenwood v. Verdon*, 1 K. & J. 74, because the personal enjoyment of the son as ulterior devisee is contemplated by the testator. His ex-

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pressions are peculiar—"If either son dies without legitimate issue, his share is to revert to and become vested in the other son united with him in the devise." The two sons are regarded as united in the ownership of the farm as tenants in common; if this union is broken by the death of one without issue, then the whole is to revert to the other son who (on the hypothesis) survives. It is impossible to reconcile all the cases. Judges will probably differ in the construction of such matters, where one starts with a rigid though not inflexible technical formula—as to what degree of contrary or inconsistent intention is sufficient to control it. I would only note one old case which has been recently referred to as an authority, viz., *Chadock v. Cowley*, 3 Cro. Jac. 695, cited in *Nason v. Armstrong*, 21 A. R., at p. 195. The words there were "that the survivor should be heir to the other if either die without issue." Now, the word "heir" so used is different from the ordinary term "son" or "daughter." It is a technical word which indicates not only the person who is to take, but also designates the nature of the interest he is to take, and, *ex vi termini*, imports a descendible estate. I may say, besides, that it is not followed by Page Wood, V.-C., in *Greenwood v. Verdon*.

A well argued case, very much in point, though weaker than the present, is to be found in the Supreme Court of the United States: *Abbott v. Essex Co.*, 18 How. U. S. 202 (1855).

The result then is that the action stands dismissed with costs.

E. B. R.

NOVERRE V. CITY OF TORONTO.

*Municipal Corporations—Negligence—Way—Opening—Invitation—
Accident—Land Adjoining Highway.*

Where the plaintiff, instead of taking the way provided for access to and from his premises, left it and proceeded to his destination upon a track belonging to the defendants, which, to his knowledge, was not a street or way completed for use or opened for public travel, no invitation or inducement being held out by the defendants to the public to travel upon it, and on which he, owing to irregularities on its surface, fell and was injured :—

Held, that he could not recover damages for his injury :—

Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow and ice, and sustained the injury upon the adjoining land.

THIS was an action against the city corporation to recover damages for injuries sustained by the plaintiff by falling in Lake street, Toronto, and injuring his thigh bone, the plaintiff alleging negligence and breach of covenant contained in his lease from the defendants, to keep the approaches to his premises in repair. The facts are stated in the judgment. Statement.

The action was tried before FERGUSON, J., and a jury, at Toronto, on the 11th March, 1896.

Laidlaw, Q.C., for the plaintiff, contended that the defendants were liable to keep the approaches to the plaintiff's premises in repair, under their covenant and at common law, citing *Corby v. Hill*, 4 C. B. N. S. 556; *Sweeny v. Old Colony R.R. Co.*, 10 Allen 368; *Vanderbeck v. Henry*, 34 N. J. at p. 471; Dillon on Municipal Corporations, 4th ed., sec. 1009; *Gilchrist v. Township of Carden*, 26 C. P. 1: that it would have been negligence on the plaintiff's part if he had attempted to walk through deep snow and over dangerous ground, when a safer part of the highway was before him, citing *O'Laughlin v. City of Dubuque*, 24 Iowa 539; *Flagg v. Inhabitants of Hudson*, 142 Mass. 280: and that the damages were not too remote, citing *Town of Prescott v. Connell*, 22 S. C. R. 147; *York v. Canada*

Argument. *Atlantic S. S. Co.*, *ib.* 167; *McKelvin v. City of London*, 22 O. R. 70; *McMahon v. Field*, 7 Q. B. D. 591; *Toronto Railway Co. v. Grinstead*, 24 S. C. R. 570; *Mowbray v. Merryweather*, [1895] 2 Q. B. 640; Elliott on Roads and Streets, pp. 9, 10, 641, 642, 643, note 2; Tiedeman on Municipal Corporations, secs. 336, 346, 352.

Fullerton, Q. C., for the defendants, on the question of negligence referred to *Tisdale v. Inhabitants of Norton*, 8 Metcalf 388; *City of Scranton v. Hill*, 102 Pa. St. 378; *Hawes v. Town of Fox Lake*, 33 Wis. 438; *Welsh v. Town of Argyle*, 62 N. W. Repr. 517: as to remoteness of damages, to *Hobbs v. London and South Western R. W. Co.*, L. R. 10 Q. B. 111; Beven on Negligence, 1st ed., p. 92 *et seq.*; *Tisdale v. Inhabitants of Norton*, 8 Metcalf 388: and as to plaintiff's act being the *causa causans*, to *Davey v. London and South Western R. W. Co.*, 11 Q. B. D. 213, 12 Q. B. D. 70; *Follet v. Toronto Street R. W. Co.*, 15 A. R. 346; Beven on Negligence, 1st ed., p. 127.

June 5, 1896. FERGUSON, J.:—

The plaintiff is lessee from the defendants of a water lot on the south side of Lake street, under a lease bearing date the 5th day of June, 1894, and, at the time of the happening of the accident occasioning the injury complained of, was, and, as I understand, still is, carrying on the business of boat-building there.

The plaintiff had formerly carried on the same sort of business upon or near the Esplanade in the city, and in consequence, or partly in consequence, of some arrangements between the defendants and the Canadian Pacific Railway Company, which I think it not necessary further to refer to here, an agreement was entered into between the defendants and the plaintiff, which was reduced to writing and bears date the 27th February, 1893, whereby it was, amongst other things, agreed that the above-mentioned lease should be granted, and whereby the defendants agreed with the plaintiff and promised to remove the

plaintiff's then present buildings (the buildings in which he had been and then was carrying on his business) to the "new site" (the lot mentioned and described in the above-mentioned lease) and place the same on as good and substantial a foundation as they (the buildings) then stood upon the old site, and to place the buildings in as good a condition as they were then in. And by this agreement the defendants agreed with the plaintiff "to afford" him "a good and convenient right of way and access to the said new premises until access could be had by way of Lake street."

In pursuance of this agreement the removal of the plaintiff's buildings took place, the lease was executed, and the plaintiff commenced and carried on, or rather continued, his business in the new premises.

Immediately to the east of the plaintiff's premises held under this lease is the property leased to and occupied by a Mr. Elgie, and immediately to the west is a property occupied by the Royal Canadian Yacht Club.

In pursuance of this agreement the defendants constructed a plank way from at or near the Esplanade to the north-east corner of Elgie's place, and, turning it at or about at a right angle westerly, continued it across the front of the plaintiff's place to the premises occupied by the Yacht Club. This was at first resting on piles driven into the bottom of the bay, and was called the "temporary approach." The plaintiff does not complain of this or the manner of its construction. It was used by foot passengers and for horses and waggons and carriages of various kinds.

In the patent from the Crown to the city, Lake street is reserved as a public street or highway, but only sixty-six feet wide. The defendants contemplated having this a street one hundred and twenty feet wide by adding a strip fifty-four feet wide to the street on the south side of it; and the plaintiff's buildings, as well as those of Elgie, and I assume those of the boat club, were placed south of this fifty-four feet strip, looking northward upon a

Judgment. street or intended street one hundred and twenty feet
Ferguson, J. wide.

At the trial there was contention as to whether or not the defendants had dedicated this fifty-four feet strip to the purposes of a public street or way, or as to whether, *quoad* the plaintiff, they were precluded from denying that they had done so. In the view that I take of the case, this contention does not seem material. The defendants did not place the plaintiff's building flush with the southerly limit of the fifty-four feet strip. A few feet intervene between the building and the southerly line of it. This fact was made the subject of discussion, but I do not consider it material.

The defendants, aided by others depositing rubbish, were filling in the whole space between the Esplanade and the southerly limit of Lake street, as widened and extended southward by the additional strip of fifty-four feet, a distance from the Esplanade of about six hundred feet, and a very considerable distance from east to west; I cannot say how far. This filling seems to have been done from the north towards the south, and from the east towards the west, and, as I understand (and as seems natural enough), presented a somewhat irregular line of front, where the carts and vehicles were dumped in the operation. As the filling proceeded from the north or the east, under the planked way leading from the Esplanade towards Lake street, and came to the surface so as to form a sufficient road, the planking became unnecessary and was for a certain distance removed.

At the time of the happening of the accident which gave rise to this litigation, this filling in had proceeded westward on Lake street as far as about the centre of the plaintiff's lot, the front of it, that is to say, the irregular line between the filling and the water, running in a north-easterly direction away from the plaintiff's premises, the filling at the plaintiff's lot, and all along as far as it had been done, extending to the southerly limit of the fifty-four feet strip aforesaid. Before the time of the accident, those or

some of those who had occasion to use this road in going to the premises of the boat club or the plaintiff's place, instead of, as formerly, continuing upon the plank road (which still existed in a state for travel) across Lake street, and turning the right angle at the corner of Elgie's place, adopted a diagonal course, departing from the planking at or near the northerly limit of Lake street, and proceeding on a line within a few feet of the brow of the filling upon the material filled in, to the planking in front of the plaintiff's place. It was said in the evidence that coal had been drawn in this way to the premises of the boat club; that others had travelled this diagonal road; and, of course, the carts engaged in filling were there from time to time.

Judgment.

Ferguson, J.

As shewn by the plaintiff's evidence, on the night of the 25th January, 1895, the carts and waggons had broken the ice and frozen material on this diagonal road or way (say rather track); the surface was thus very irregular and hard, and not a safe place to walk. The planking in front of Elgie's place was used as a sidewalk, as well as a road for carts and waggons, and so in front of the plaintiff's place. It does not appear whether or not a sidewalk had been completed on the south side of Lake street farther east, so as to connect with other sidewalks leading towards the central part of the city. From what does appear one would incline to think it had not.

On this night of the 25th January, 1895, the plaintiff, having occasion to come to or towards the city, was coming on foot, and, instead of taking the planked approach and turning the right angle of the corner of Elgie's place, he took this diagonal track, and, no doubt by reason of its irregularities, he fell, and unfortunately broke his thigh bone. The place of the accident, was on this diagonal track, and on the part of Lake street composed of the aforesaid fifty-four feet strip.

The plaintiff's evidence shews that this walk, the planking in front of Elgie's place, was then blocked up with snow and ice a couple of feet deep, and that there was snow on the approach all the way to the railway tracks; that it

Judgment. had not been cleaned off that winter. The plaintiff says that if the snow had been cleaned off, he would have taken the planking, the sidewalk to the corner of Elgie's place, and then proceeded by the approach, the road made by the defendants. In his evidence he says that at the time of his accident Lake street had not been levelled down for travel; that the public had not been invited to use Lake street. He says he knew that Lake street had not been completed for use, and that he went out upon it without giving the subject a thought. He says this diagonal track was about eighty feet long; that it was over that part of the street that was being filled in; and that no attempt had been made to put it into a shape for use.

The plaintiff says that it was because the snow was on the planking—the sidewalk—that he took the diagonal track. He says he does not know that the defendants were notified or had notice of the state of the snow.

In these or about these circumstances, the plaintiff brings the action to recover damages for the injury he sustained.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, saying that he did not intend giving any evidence.

On this motion I reserved judgment. The case was then, with the approval of both counsel, left to the jury to assess the damages on the assumption that the plaintiff was entitled to recover, and all other matters and questions in the action were to be decided and determined by me, it being stated that if my opinion should be in favour of the defendants, a nonsuit should be entered.

A very large number of cases and authorities were at and after the argument cited and referred to by counsel on each side. I have taken occasion to examine these, and, as I think, with some care.

I am, on the evidence, of the opinion that Lake street, whether considered as being composed of the sixty-six feet only or of the whole one hundred and twenty feet, was not, at and about the place where the accident happened, at the time of the accident, a street or way completed for use or opened for public travel

at all, and, according to the plaintiff's own testimony, he was aware of this. There is no evidence shewing that there was any public or other travel on it lengthwise of the street, excepting, perhaps, that of the carts or vehicles employed in the work of filling before spoken of, and the limited amount of travel upon the diagonal obliquely lying track on which the accident occurred was, as I think, purely at the will and option of those who went there. I find that it is not shewn that there was any invitation by the defendants, or any inducement or allurement held out by the defendants, to the public or to any one, to use this track called the "diagonal track" as a way or road, as seems to have been the case in *Corby v. Hill*, 4 C. B. N. S. 556, referred to in *Vanderbeck v. Henry*, 34 N. J. at pp. 471, 472, and in many other cases. Judgment.
Ferguson, J.

The defendants were doing the work of filling in this street, together with another large area. The street cannot, in any view that I am able to take, be considered as having been completed for use at the place of the accident, and there having been no invitation or inducement held out by the defendants to the public or others to travel upon it at this place, the plaintiff cannot, as I think, be properly held to occupy a stronger position in his effort to recover damages for his injuries than if the place of the accident were private property, not being a road or way or intended to be a road or way at all.

Then, but for the snow, the way provided for the plaintiff by the defendants was in good condition; and, even if all things, in respect of its being a public way and a part of it in front of Elgie's place being a sidewalk, are assumed to be in the plaintiff's favour, yet the snow or ice, if there were ice, did not, on the plaintiff's own shewing, render the way either impassable or dangerous. The utmost that could be said was that it would occasion inconvenience to a passenger or traveller at the place.

Even if it be further assumed in favour of the plaintiff that in all the circumstances disclosed it was the duty of the defendants to remove the snow from the place in front

Judgment. of Elgie's, answering in some measure the purposes of a
Ferguson, J. sidewalk (I am not intending to say that it was their duty),
still the case of *Welsh v. Town of Argyle*, 62 N. W. Repr.
517, and the reasoning of Judge Newman therein (which
I cannot but think good and sound reasoning) are directly
against the right to recover from the defendants.

So also is the case *Tisdale v. Inhabitants of Norton*, 8
Metcalf 388, in which it was decided that an action to reco-
ver damages for an injury received by reason of a defect or
want of repair in a highway which the town is obliged by
law to repair cannot be maintained by a party who goes
out of the highway because of defects therein, into the
adjoining land, and there receives an injury. The reason-
ing of Dewey, J., in this case seems to me very strong—
indeed, as I think, unanswerable.

The case *Hawes v. Town of Fox Lake*, 33 Wis. 438, decides
that to render a town or city liable for an injury sustained
on a highway, it must have been sustained by a traveller, and
the defect of the way, either alone or combined with some
matter of pure accident for which the traveller was not in
fault, must have been the sole cause of the injury. That
case seems also to indicate plainly that the plaintiff was
not at the time of the accident to him a traveller on the
highway, even assuming that the "temporary approach"
was a highway.

There are many decisions to the same effect as those I
have referred to. The greater number that I have seen
are American cases. The reasoning in them is, however, in
many instances, so clear and strong as to almost defy con-
tradiction.

I am of the opinion that the plaintiff cannot recover on
the branch of his case that is for non-repair of a highway
or for non-removal of snow or ice, and as to the branch of
the case founded upon the contract "to afford" him a "con-
venient right of way and access" until, etc., I am of the
opinion that no breach of the contract has been shewn.

The result is that a nonsuit should be entered, with
costs—if the defendants insist on having their costs.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. BRENNAN.

Criminal Law—Murder—Manslaughter—Criminal Code, sec. 229—Provocation—Assault—Legal Right—New Trial.

The prisoner was tried upon an indictment for murder. It was not denied that he had killed the deceased, but it was urged that, by sec. 229 of the Criminal Code, the offence was reduced to manslaughter, as having been committed "in the heat of passion caused by sudden provocation." There was evidence that just before the killing the prisoner had called at the house of the deceased to see the latter, who ordered him out and immediately laid hands on him and put him out of the house, when the prisoner drew a revolver and shot deceased. The Judge at the trial directed the jury that deceased was, at the time he was killed, "doing that which he had a legal right to do," and that there was, therefore, no provocation and no question of fact to be submitted to the jury to reduce the crime to manslaughter :—

Held, misdirection ; for whether or not the deceased, at the time he was shot, was doing what he had a legal right to do depended upon whether, if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting, the deceased had, before laying hands upon him, ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether, if violence was used in putting him out, it was greater than was necessary ; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the prisoner's contention on these points.

New trial directed, upon an appeal under sec. 744 of the Criminal Code.

THE prisoner was tried at Barrie before ARMOUR, C.J., Statement.
and a jury, upon an indictment for the murder of John A. Strathy, and was found guilty.

On the 4th May, 1896, *Lount*, Q. C., for the prisoner, moved under sec. 744 of the Criminal Code, before a Divisional Court composed of MEREDITH, C. J., and ROSE and MACMAHON, JJ., for leave to appeal against the verdict, and to move for a new trial, leave in writing having been granted by the Attorney-General.

J. R. Cartwright, Q. C., appeared for the Crown.

Leave was granted by the Court.

Section 744 above mentioned provides: "If the Court refuses to reserve the question, the party applying may, with the leave in writing of the Attorney-General, move the Court of Appeal as hereinafter provided. The Attorney-General may in his discretion give or refuse such leave.

Statement. 2. The Attorney-General, or any person to whom such leave as aforesaid is given, may on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may upon the motion and upon considering such evidence (if any) as they think fit to require, grant or refuse such leave.

3. If leave to appeal is granted, a case shall be stated for the opinion of the Court of Appeal as if the question had been reserved."

By sec. 3 (e) of the Criminal Code, as amended by 58 & 59 Vict. ch. 4 (D.), the expression "Court of Appeal" in the Code includes, in the Province of Ontario, any Divisional Court of the High Court of Justice.

Pursuant to sec. 744 and the leave granted, a case was stated by ARMOUR, C. J., for the opinion of the Court, the questions asked being: (1) Was the prisoner, on the evidence, properly found guilty of murder? (2) Was there any misdirection in the charge on the grounds complained of?

The facts of the case, the evidence, and the Judge's charge are sufficiently set out in the judgments.

The case was argued before the Court, composed as above, on the 8th May, 1896.

Lount, Q. C., for the prisoner. The learned Chief Justice was in error in entirely withdrawing from the jury the question of manslaughter. He directed the jury that they could find only murder unless the plea of insanity was sustained. He was wrong in himself determining the facts; the facts were for the jury. It was for the jury to say whether the act of the deceased in putting the prisoner out was an insult or a wrongful act. The Judge has not the right to determine any single fact. He took the evidence of Greer, the detective, and found that the deceased was doing what he had a legal right to do. But, even if no other witness had been called, the jury had the right to reject his evidence, if they chose to disbelieve it. The

mental condition of the prisoner rendered him liable to provocation. There was greater provocation to him than to an ordinary man. The nature of the man must be considered in determining whether there was provocation: *Rex v. Lynch*, 5 C. & P. 324; *Rex v. Thomas*, 7 C. & P. 817; *Regina v. Davis*, 14 Cox 563. The action of the deceased in putting the prisoner out of his house was not justifiable at all. If a person receives a blow and immediately avenges it, it is not manslaughter: *Rex v. Anderson*, 1 Russell on Crimes, 5th ed., p. 701; *Rex v. Thomas*, 7 C. & P. 817; *Rex v. Lynch*, 5 C. & P. 324; *Rex v. Hayward*, 6 C. & P. 157. Words of provocation may be, along with other cause, an excuse for manslaughter: Russell, pp. 676-7; *Regina v. Rothwell*, 12 Cox 145; *Regina v. Sherwood*, 1 C. & K. 556; *Regina v. Smith*, 4 F. & F. 1066.

J. R. Cartwright, Q. C., for the Crown. The learned Chief Justice was right in withdrawing the question of manslaughter from the jury, because the evidence did not shew manslaughter within the language of sec. 229 of the Code.

May 18, 1896. MEREDITH, C. J.:—

The sole question involved in this appeal is as to the correctness of the direction of the learned Chief Justice to the jury that it was not open to them on the evidence to find a verdict of manslaughter.

By sub-sec. 1 of sec. 229 of the Criminal Code it is provided that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

Sub-section 2 deals with the question of provocation, and it provides that "any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool."

Judgment.
Meredith,
C.J.

Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, are questions of fact (sub-sec. 3).

The provision of sub-sec. 3 which I have quoted is subject to this qualification which is contained in it:

"No one shall be held to give provocation to another by doing that which he had a legal right to do."

The learned Chief Justice held that upon the evidence in this case the deceased, Strathy, was, at the time he was shot by the prisoner, doing that which he had a legal right to do, and that there was, therefore, no provocation and no question of fact to be submitted to the jury to reduce the crime from murder to manslaughter.

I am, with great respect, of opinion that this ruling was erroneous.

Whether or not the deceased at the time he was shot by the prisoner was doing what he had a legal right to do depended upon whether, if the jury accepted the statement of the prisoner given in evidence, as to the circumstances attending the shooting, as true, the deceased had before laying hands upon him ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether, if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the prisoner's contention on these points.

I extract from the evidence of the witness Greer the following, which was deposed to by him as the prisoner's statement of what immediately preceded the shooting:

"When Strathy came through the glass door, he said—the first words Strathy used were, 'The devil! Brennan, you here again?' Then he says, 'yes, Mr. Strathy, I came here to see about my children, as I understand you know something about them.' Then Mr. Strathy said, 'I have told you before that I know nothing about your children

or your family, and I don't want you to be bothering me any more.' To get out of here. And he said he immediately caught him by the coat collar—in fact Brennan caught my collar to shew me how Strathy caught him, and he shoved him out."

Judgment.
Meredith,
C.J.

According to the evidence of Mr. Drury, the statement of the prisoner to him was that he had no intention of killing any one when he came to Barrie, that he desired to speak to Mr. Strathy, and that the latter was very abrupt with him, and that he (the prisoner) had not gone far with the conversation before Mr. Strathy seized him by the back of the neck and forced him through the door, and that he fell on his hands and knees, and that he at once fell into a dreadful passion—a passion, and he did it, and that that was the reason for the shooting.

And according to the evidence of the witness Marron, who saw the prisoner very soon after the shooting, there was then blood across the knuckles of his left hand, which, according to the prisoner's statement, resulted from the hand coming into contact with the ice or frozen snow when, as he said, he was thrown out of the porch or vestibule by Mr. Strathy.

Had the deceased been the defendant in an action by the prisoner for assault, and had he pleaded that the acts complained of were done by him in defence of his house: Bullen & Leake, 4th ed., vol. 2, p. 491: and excess had been replied, would it have been proper on this evidence for the Judge at the trial to have withdrawn the case from the jury and to have directed a verdict for the defendant?

Unless he could properly have done so, and it seems to me clear that he could not, how can the ruling and direction to the jury that the deceased was doing what he had a legal right to do, be supported? It seems to me that it cannot, and that there was a preliminary question of fact to be determined by the jury before it could be said that the deceased was doing what he had a legal right to do, and that that question should have been submitted to the jury.

Judgment.

Meredith,
C.J.

Whether the jury would have accepted the prisoner's statement as true, or, if true, would have come to the conclusion that the act of Mr. Strathy amounted to provocation, within the meaning of the Code, or if it did amount to provocation, whether it was such as to reduce the crime from murder to manslaughter, are questions not material to the present inquiry. It is sufficient for the disposition of the appeal in favour of the prisoner that there was evidence which, if they accepted as true the prisoner's statement as to the circumstances attending the shooting, was proper to be considered by them for the purpose of determining whether the prisoner's offence should be reduced from murder to manslaughter.

The second question stated in the reserved case must be answered in the affirmative.

As the result of the answer to the second question is that the conviction must be set aside and a new trial had, it is unnecessary to consider the first question submitted. I do not, however, wish to be understood as expressing an opinion adverse to the propriety of a finding, on the whole evidence, of murder.

The case seems to indicate that the point upon which we have decided in favour of the prisoner was not as clearly taken at the trial as it might have been, and the objection to the charge appears to have been directed rather to the question whether the act of the deceased amounted to provocation within the meaning of sub-sec. 2, than to the ruling on the preliminary question whether the deceased, at the time he was shot by the prisoner, was doing that which he had a legal right to do. I cannot, however, say that the objection to the charge is not wide enough in its terms to cover the point that it was for the jury to say whether the act of the deceased in putting the prisoner out, if he was put out, was accompanied by more violence than was necessary or justifiable for the purpose, so as to make it an unlawful act.

ROSE, J. :—

Judgment.

Rose, J.

Case stated for the opinion of the Court of Appeal under sec. 744 of the Criminal Code of 1892.

The questions for the opinion of the Court are :

First. Was the prisoner on the evidence properly found guilty of murder ?

Second. Was there any misdirection in the charge on the grounds complained of ?

The real questions for consideration here are :

First. Was there any evidence to go to the jury of a wrongful act or insult on the part of Mr. Strathy, which might amount to provocation, reducing the offence from culpable homicide to manslaughter within the meaning of sec. 229 of the Code ?

Secondly. Did the learned Judge withdraw the consideration of such evidence from the jury ?

Another question was raised as to whether the learned Judge should not have directed the jury that in determining whether the act or insult was of such a nature as to deprive the prisoner of the power of self-control, they should consider the peculiar mental and nervous condition of the prisoner as a fact which might make him more liable to provocation and to a sudden rise of passion so as to deprive him of the power of self-control.

Under sec. 229 the question of whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, are declared to be questions of fact. And by the same section it is further declared that "no one shall be held to give provocation to another by doing that which he had a legal right to do * * * ." The section further declares that "culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by a sudden provocation." Sub-section 2 is : "Any wrongful act or insult, of such nature as to be sufficient to

Judgment.

Ross, J.

deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool."

The evidence relied upon by the prisoner on this appeal was offered by the Crown and was in the nature of statements made to the detective, Greer, and to Sheriff Drury, and the simple point is whether such evidence shewed that in ordering the prisoner off the premises Mr. Strathy acted reasonably, giving him time to go, and upon refusal gently laid his hands on him in order to remove him, doing no more than was necessary for that purpose, or whether Mr. Strathy, upon ordering the prisoner to leave the premises, immediately and without giving him opportunity to do so seized him and threw or forced him out so as to constitute himself a trespasser making an assault upon the prisoner. If Mr. Strathy unnecessarily laid hands upon the prisoner, he was not doing what he had a legal right to do, and it became a question of fact then for the jury whether the act, thus being wrongful, was one which amounted to provocation, and whether by such provocation the prisoner was actually deprived of the power of self-control. I think it is impossible to say that there was no evidence to go to the jury, to be considered by them, as to the reasonableness or unreasonableness of the conduct of Mr. Strathy in taking hold of the prisoner and throwing him out of the door. I do not at all say whether, upon the consideration of such evidence together with all the other evidence in the case, the verdict should be for or against the prisoner; that is not within our province; and in a case of this nature I shall endeavour most carefully to abstain from expressing any opinion whatever upon the evidence or weight of evidence, confining myself solely to the question as to whether there was any evidence to be submitted to the jury.

On page 84 of the notes of evidence I find these words used by the witness Greer as stated to him by the prisoner: "When Strathy came through the glass door, he said—the

first words Strathy used were, 'The devil! Brennan, you here again?' Then he says, 'yes, Mr. Strathy, I came here to see about my children, as I understand you know something about them.' Then Mr. Strathy said, 'I have told you before that I know nothing about your children or your family and I don't want you to be bothering me any more.' To get out of here. And he said he *immediately* caught him by the coat collar—in fact Brennan caught my collar to shew me how Strathy caught him, and he shoved him out."

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Rose, J.

On page 70 Mr. Sheriff Drury gave the following answer to a question put by Mr. Lount: "He said that Mr. Strathy was very impatient with him." "Q. He spoke of having told Mr. Strathy what he had come there for? A. Yes, he said, 'I had got so far in my conversation on the subject when Mr. Strathy seized me by the back of the neck.'

"Q. That he 'had got so far?' A. Yes, the impression he left on my mind was that he had not got very far in his conversation.

"Q. That he had got partly into his conversation about his troubles, about what he had come to see him about, and then Strathy seized him by the back of the neck and did what? A. Forced him out through the door on to the snow.

"Q. Did he not say that Strathy had thrown him down? A. That he had thrown him through the door and he had fallen upon his hands and knees on the snow.

"Q. That he had caught him by the back of the neck and thrown him through the door and he had fallen upon his hands and knees, and then he remembered that he had the pistol and he drew it and fired? A. Yes.

"Q. That he was in a very great passion? A. Yes.

"Q. Did he not say that when he went there he had no intention of hurting anybody, but when Strathy threw him out that way, it put him in a passion? A. Yes, that was the explanation he made of the shooting."

On page 75, in a statement made by the witness Greer, the following language was used :—

Judgment.

Rose, J.

"A. He would not listen to Mr. Brennan, and he caught him by the coat collar and told him to get out. He said that he shoved him kind of towards the door, and he reached with his left hand and opened the door, that is, Mr. Strathy did, and shoved him out with his right hand; he still had hold of his coat collar. He said that when he went down off the step of the porch, he slipped and fell on his hands and knees. He said that made him very mad, very angry, and just as he raised up he shot him, he said he pulled the revolver and shot him, and he said, 'Take that, God damn you.'"

If Mr. Strathy had not been shot and Brennan had brought an action for assault against him, and Mr. Strathy had pleaded in the old form of plea as found in Bullen & Leake, "that at the time of the alleged trespasses he was possessed of a dwelling-house wherein the plaintiff was trespassing and making a noise and disturbance, whereupon the defendant requested the plaintiff to cease from so doing and to leave the said house, which the plaintiff refused to do, and thereupon the defendant gently laid his hands on the plaintiff in order to remove him (and removed him) from the said house, doing no more than was necessary for that purpose, which are the alleged trespasses," could it be said that there was no evidence to leave to a jury upon the issue raised by such defence? It may be that upon review of the whole evidence it ought to be found that such a plea could be sustained, but on the passages which I have above given, I think that the jury must have been directed to consider whether or not force was used before it was necessary and whether the force was more or greater than was necessary.

There was, in my opinion, therefore, evidence to go to the jury that Mr. Strathy was not doing what he had the legal right to do, and, if that fact was so found by the jury, that then there was evidence which they must have considered as to whether or not such wrongful act amounted to provocation, and whether the prisoner was actually deprived of the power of self-control by such provocation.

The learned Judge did not leave any such question to the jury. On the contrary, he stated as follows:—

Judgment. J.

Rose, J.

“Now, it is said that you ought to reduce the crime from murder to manslaughter. Mr. Strathy ordered him out. He had a right to order him out. A person who comes into your house, comes there by your license. You can revoke that license at any moment. You can tell him to get out, and if he does not get out, you are justified in putting him out. Therefore Mr. Strathy, when he ordered him out and then took hold of him to put him out, was doing what he had a legal right to do. Therefore there was no provocation to reduce the crime from murder to manslaughter.” In so charging the jury I think the learned Judge was withdrawing from them the consideration of the question which was for them to determine, and so there was misdirection in the charge.

The learned Judge further said, in considering the question of whether or not there was justification in using the weapon, as follows:—

“So that I am bound to tell you that under the facts proved before you the prisoner at the bar is guilty of murder.”

By this direction it is clear that all consideration of the question of whether or not the facts reduced the charge from culpable homicide to manslaughter was withdrawn from the jury.

Again on page 336:—“In the first place, did he shoot Strathy? That is admitted. Counsel admits that, although urging that the crime ought to be reduced to manslaughter. I shewed you reasons why it should not be reduced to manslaughter. In the first place, because Mr. Strathy was within his right in ordering him out and in turning him out if he did not go. And in the next place, because he had no right to use a deadly weapon under the circumstances in which he used it, and having used it in that way, the law implies malice, and he used it intentionally, and the intentional shooting with malice is murder.”

Judgment. The learned Judge left to the jury the question of sanity or insanity, and further directed them :—
Rose, J.

“If you think that he was capable of appreciating the nature and quality of the act, and knowing that the act was wrong, then your simple verdict would be ‘guilty.’”

It is clear, therefore, that the learned Judge did not leave to the jury the question of whether or not on the evidence before them the prisoner was guilty of murder or manslaughter.

Mr. Lount's objection was as follows: “Your Lordship told the jury there was no provocation for manslaughter. I submit your Lordship has entirely taken from the jury what is their especial privilege.” To which the learned Judge answered: “No; it is a matter of law for me to say whether the man was doing right.” Mr. Lount:—“At the same time it is for the jury to determine the facts.” His Lordship:—“The facts are not in dispute.”

It is not, therefore, in my opinion, necessary to determine whether the learned Judge should have directed the jury that in considering whether or not the provocation deprived the prisoner of the power of self-control, they should take into consideration the peculiar mental and nervous condition of the prisoner, as shewn by the evidence. I feel a difficulty upon the wording of the Code in saying that there was any error in the charge in such respect. By sub-sec. 2 of sec. 229, as above quoted, the wrongful act or insult, to amount to provocation, must be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

By sec. 7 of the Code, “All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.”

Reading the above two sections together, it seems to me that, whatever may have been the law prior to the passing of the Code, it is now open to grave question whether the

act must not be such an one as would be sufficient to deprive an ordinary person of the power of self-control, and that unless the condition of the accused is shewn to be such as to amount to insanity within the meaning of sec. 11 of the Code, it is intended to exclude from consideration the varying moods and conditions, physical or mental, of different persons so as to render any act, which committed by one person would be murder, if committed by another, manslaughter. It may be that if it is shewn that the act was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, then the mental or nervous condition of the accused should be considered in determining whether or not the accused did act upon such provocation on the sudden, and before there had been time for his passion to cool.

Judgment.
Rose, J.

I merely indicate the possible construction of the section, as I base my opinion upon the first ground as to misdirection, upon which ground I think that the appeal must be allowed and a new trial directed.

MACMAHON, J. :—

By sec. 229 of the Criminal Code, "culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

"2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

"3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do

Judgment. in order to provide the offender with an excuse for killing or doing bodily harm to any person.”

MacMahon,
J.

According to the above 3rd sub-section, where by the evidence a question arises as to whether a wrongful act or insult amounts to provocation so as to reduce the crime from murder to manslaughter, that question is one of fact, and must be submitted to the jury. Not to do so would be the usurpation by the Judge of the jury's functions.

The nature and extent of an assault which might be considered as sufficient provocation to reduce a homicide from murder to manslaughter was considered by English Judges, at least as early as 1641. Hale's Pleas of the Crown, vol. 1, p. 455, mentions the following cases shewing that an assault of not a serious character may be sufficient provocation to reduce a homicide from murder to manslaughter: “If A. be passing the street, and B. meeting him, (there being convenient distance between A. and the wall,) takes the wall of A. and thereupon A. kills him, this is murder; but if B. had justled A. this justling had been a provocation, and would have made it manslaughter, and so it would be, if A. riding on the road, B. had whipt the horse of A. out of the track, and then A. had alighted, and killed B. it had been manslaughter. 17 Car. I., *Lanure's* case.”

In *Rex v. Hayward*, 6 C. & P. 157, the prisoner was indicted for the murder of John Corser. The facts disclosed that the deceased was requested by his mother to turn the prisoner out of her house, which the deceased, after a short struggle with the prisoner, effected, and in doing so gave him one kick. On the latter leaving the house, he said to the deceased, “he would make him remember it,” and then went a few hundred yards to his lodging, where he procured from a pantry a sharp butcher's knife, with which he usually ate, and coming from his lodging he met the deceased, who had followed him down the street to give him his hat, which he had left behind. They talked together, and walked in the direction of the house of prisoner's mother, the deceased

desiring the prisoner not to go to his mother's house that night. The deceased gave the prisoner his hat, when the latter exclaimed, with an oath, that he would have his rights, and instantly stabbed the deceased with the knife in two places, one a mortal wound in the belly. When the prisoner stabbed the deceased a second time, he said he had served him right.

Judgment.

MacMahon,
J.

Tindal, C.J., in charging the jury, said there could be little doubt that the death of the deceased had been caused by the prisoner having stabbed him ; and "the remaining and principal question for their consideration would be, whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding ; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only : or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given ; in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner was the shortness of time which had elapsed between the original quarrel and the stabbing by the prisoner ; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place."

In *Regina v. Thomas*, 7 C. & P. 817, the indictment was for maliciously stabbing.

Parke, B., in charging the jury, said : "There is no doubt that whenever death ensues from violence inflicted by the hand of another, the law presumes, *prima facie*, that it is murder ; and it must be so treated, unless, upon the evidence for or against the accused, the jury are induced to come to a conclusion that the offence is of a less degree. Here the question would be, if death had ensued, whether it would have been manslaughter. If a person receives a blow, and immediately avenges it with any instrument

Judgment. that he may happen to have in his hand, then the offence
MacMahon, will be only manslaughter, provided the blow is to be
J. attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things, first, that there should be that provocation, and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation," etc.

It is unnecessary that I should refer at length to the charges of other eminent Judges, as shewing the care (I might almost say solicitude) evidenced by them, when the evidence disclosed that an assault had been committed, in leaving to the jury the question whether the assault was of such a character as should have furnished provocation, and that the mortal wound was given so recently after the provocation as to reduce the killing from murder to manslaughter. The following cases may be referred to : *Rez v. Kirkham*, 8 C. & P. 115 ; *Regina v. Sherwood*, 1 C. & K. 556 ; *Regina v. Smith*, 4 F. & F. 1066.

The evidence of Greer and of Sheriff Drury as to what, according to the statements of the prisoner made to them, happened at Mr. Strathy's house, fully appears in the judgment of my learned brother Rose, and therefore need not be repeated. But I extract from the charge of the learned Chief Justice the following passages, as shewing how he regarded the evidence of Mr. Strathy's ejection of the prisoner from his house, and his direction to the jury as to how in law that evidence was to be regarded by them. He said :

" He goes to Mr. Strathy's house and is admitted. Mr. Strathy comes down and opens this glass door from the reception room into the vestibule. He is standing in the vestibule, invited in there by the girl who answered the door. Mr. Strathy says, 'The devil! Brennan, are you there again?' Brennan says, 'I came to inquire about my children.' Strathy says, 'I don't know anything about your children, and I told you that before. Now, I want you to go away from here.' He began to remonstrate. I

am giving you the evidence as Greer gave it of the prisoner's statement to him. Strathy would not listen to him, took hold of his coat with his left hand, opened the door with his right, and pushed him out. He was unwilling to go. In going out from the vestibule into the porch there is a step; on that he slipped and fell on his hands and knees, with his face towards Strathy. He then remembers that he has a revolver in his pocket, he puts his hand in his pocket, draws his revolver, aims it at Strathy, and fires.

Judgment.
MacMahon,
J.

"Now, what was the consequence? What offence did he commit in doing that? He intentionally fired at Strathy, and therefore it was an intentional killing of Strathy. From every intentional unlawful killing the law presumes malice. Malice is implied. Malice is always implied in law wherever a person intentionally does a wrongful and unlawful act.

* * * * *

"Shooting at Strathy was an unlawful shooting, and a man is presumed in law to intend the necessary or natural result of his own act. He intended to shoot him. He shot at him, and the law presumes that he intended to kill him. He did kill him. Then, it being an intentional killing of Strathy, the law implies that he did it maliciously.

"Now, it is said that you ought to reduce the crime from murder to manslaughter. Mr. Strathy ordered him out. He had a right to order him out. A person who comes into your house comes there by your license. You can revoke that license at any moment. You can tell him to get out, and if he does not get out, you are justified in putting him out. Therefore, Mr. Strathy, when he ordered him out and then took hold of him to put him out, was doing what he had a legal right to do. Therefore, there was no provocation to reduce the crime from murder to manslaughter.

"But there is another ground. Even if Strathy was unlawfully assaulting the prisoner, the prisoner had no

Judgment. right, under the circumstances, to use a deadly weapon in the manner in which he did. He was out in the porch ;
MacMahon, Strathy had not hold of him ; Strathy had hold of the
J. door ; he was out in the porch, and all he had to do was to get up and go away. Even when a man is assaulted he cannot use a deadly weapon until he has retreated as far as he can, and being unable to retreat further has to use it for the protection of his own life. So that even if Strathy was in the wrong, which I have told you he was not ; he had a right to order him out, and he had a right to put him out ; but even if he was in the wrong, the prisoner had no excuse for using a deadly weapon and killing Strathy under the circumstances that occurred. So that I am bound to tell you that under the facts proved before you the prisoner at the bar is guilty of murder."

On an objection to his charge that he had told the jury there was no provocation given which could reduce the crime to manslaughter, and that in so doing he had taken from the jury that which it was their privilege to pass upon, the learned Chief Justice replied, "No, it is a matter of law for me to say whether the man was doing right."

The charge withdrew altogether from the jury the question : If the prisoner having been requested by Mr. Strathy to leave the house, whether time was given him to leave before being ejected ; and whether the ejection, which caused the prisoner to fall on the side-walk, was accompanied with more force than was necessary ; and was the provocation thereby given sufficient to deprive the prisoner of the power of self-control ; and did he fire the fatal shot while in that condition ? This, with a reference to the prisoner having to procure the pistol from an inside pocket, as shewing mental reflection, and, therefore, power to deliberate, would have been a proper direction to the jury, and had they passed upon the question thus raised adversely to the prisoner, no fault could have been found with the verdict.

The questions thus raised not having been submitted to the jury, there was, in my opinion, misdirection on the part of the learned Chief Justice.

On examination, it will be seen that the three sub-sections of section 229 above referred to (with the exception of the words "or insult" in the 2nd and 3rd sub-sections) simply embody in the shape of abstract propositions the rule of the common law as to what is required in order to reduce a homicide from murder to manslaughter.

Judgment.
MacMahon,
J.

There being, as I conceive, misdirection in the charge, the trial and conviction of the prisoner must be set aside, and a new trial directed.

E. B. B.

[DIVISIONAL COURT.]

SANDUSKY COAL COMPANY V. WALKER ET AL.

*Company—Promoters—Liability for Debts Incurred before
Incorporation—Contribution.*

proposed incorporator in a joint stock company, who, in advance of the incorporation takes a practical part in the prosecution of the intended business of the company, or who sanctions or ratifies the conduct of affairs by some act, not being a mere subscription to shares, is liable to contribute, with other subscribers to stock in a like position, to a liability properly incurred in carrying out the objects of the projected company, and the proportionate amount of contribution by each depends on his share subscription irrespective of the amount paid on the shares.

THE statement of claim as amended by the addition of certain parties defendant, set out that the plaintiff company was a partnership, and at the time thereafter mentioned was carrying on business in the city of Sandusky, in the State of Ohio; that about the month of May, 1892, the original defendants entered into an agreement to organize a joint stock company under the name of the Kingsford and Pelée Navigation Company, (Limited), having its chief place of business at the village of Kingsford, in the county of Essex, with the object of purchasing, building and owning one or more steamboats and of carrying on business therewith upon the inland lakes, and the said original defendants agreed to subscribe for certain

Statement.

Statement. amounts of the stock of the proposed company ; that prior to the incorporation of the said proposed company the original defendants entered into an agreement to carry on the business of the proposed company, and in pursuance thereof purchased the steamer "Imperial" and commenced to run the same upon the inland lakes and rivers and between points in Ontario and the United States aforesaid ; that in the carrying on of the said business the steamer "Imperial" touched at the city of Sandusky aforesaid, and while there, for the purpose of the business and the running of the steamer, the original defendants purchased from time to time during the season of 1892 from the plaintiff company various quantities of coal, amounting in all to the sum of \$1,147, upon which was paid at various times during the said season, and the season of 1895, the sum of \$474.38 ; that the defendants refused to pay the said indebtedness ; that the added defendants were so added at the instance of the defendant Walker, who claimed they were jointly interested and liable with him, if at all, upon the plaintiffs' claim, and that if so, the plaintiffs claimed against them also as from the original defendants. The defendants put in various defences denying liability, which it is not necessary further to specify here, as they are sufficiently indicated in the judgments.

On October 31st, 1895, judgment was signed by consent referring the matters in question to Frank E. Marcon as special referee under section 102 of the Judicature Act to ascertain and determine the rights of the defendants as between themselves.

By his report of January 28th, 1896, the special referee found that all the defendants were bound to contribute to the payment of the coal bill sued upon in the ratio of \$5.07 per share.

A number of the defendants appealed from this report, and the appeals were argued before BOYD, C., and FERGUSON, and ROBERTSON, JJ., on May 20th and 22nd, 1896.

W. R. Riddell, for eight of the defendants added after

issue of the writ, namely, S. L. Brown, Arthur Conklin, James Doan, Richard Gregory, C. Leggatt, S. L. McKay, Randolph Ulch, and S. Wigle. Those who have paid up the full amount of their stock, are not liable any further: *Coleman v. Bellhouse*, 9 C. P. 31, 42, 44; affirmed on appeal February 3rd, 1860, unreported. As to what circumstances will constitute a partnership, rendering one liable for the debts of another, see *Cox v. Hickman*, 8 H. L. C. 268; *Mollwo, Marsh & Co. v. Court of Wards*, L. R. 4 P. C. 419; *Badeley v. Consolidated Bank*, 38 Ch. D. 238. It is obvious there was no intention of these parties to constitute themselves a trading partnership. They expected a charter as a limited liability company. *Seiffert v. Irving*, 15 O. R. 173 and *Gildersleeve v. Balfour*, 15 P. R. 293, are distinguishable, because there an action was brought directly against the parties by creditors; here it is a case of contribution between the parties themselves. This is not a partnership at all: *Bright v. Hutton*, 3 H. L. C. 341, 368-9; Lindley on Companies, 5th ed., pp. 18, 143-145; *Fox v. Clifton*, 6 Bing. 776; *Bourne v. Freeth*, 9 B. & Cr. 632; *Thames Navigation Co. v. Reid*, 13 A. R. 303, 308-310, 312; Thring on Joint Stock Companies, 5th ed., pp. 24-26. Mere presumptive or constructive agency is not enough to make the parties liable for each other. There must be express agency: *Sibson v. Edgworth*, 11 Jur. 626; *Captain Tanner's Case*, 5 DeG. & Sm. 182, 190. The agreements are said to render us liable. But they were not really agreements at all, they were merely propositions which were not carried into effect. There is no estoppel in this case. But suppose we were joint owners of the steamer "Imperial," that will not justify a claim by one joint owner against the others. Nothing was done for us; what was done was for an intended company. The mere expenditure of money in or about the boat would give no right of action to the persons expending it against the owners: *Leigh v. Dickeson*, 15 Q. B. D. 60. Walker does not come here as a creditor, but as a volunteer who has expended so much

Argument. money. He voluntarily paid the amount without any compulsion of law, and he paid for himself and not for us.

Mabee, for R. W. Dease, being also one of the added parties. I adopt the argument of Mr. Riddell. But my client is in a better position. He admits a liability in respect to the coal bill up to August 29th, 1892, when he severed his connection with this concern. It is impossible to adjust the rights of the various parties in this litigation. Moreover, we subscribed for stock in a company to be incorporated under Ontario charter, with a capital of \$7,000; whereas, ultimately, after we had withdrawn, the incorporation which was obtained was a Dominion one, and with a larger capital.

W. Cassels, Q. C., for the defendant Walker. The case of *Coleman v. Bellhouse*, 9 C. P. 31, shews that although the defendants are partners, yet that they are not liable equally, because the liability was agreed to be limited to the amount of their subscriptions, and if the amount thus subscribed should prove insufficient to pay the debt, then they are only liable proportionately to the amounts respectively subscribed by them. *Thames Navigation Co. v. Reid*, 13 A. R. 303, does not apply to this case. There the agreement sought to be specifically performed purported to be made with a company which never was formed, and the action failed because there was no vendee. *Seifert v. Irving*, 15 O. R. 173, shews the true position of the parties in this case. The contribution must be amongst all the subscribers according to the amount of their subscriptions, and if any are insolvent, then any deficiency so arising must be borne in the like proportion by the solvent subscribers.

Murphy, for the defendant Woollatt.

A. H. Clarke, for the respondents Grenville, Malotte and Harris. We submit to the judgment of the Court, but should be entitled to contribution.

Riddell, in reply.

June 24th, 1896. BOYD, C. :—

Judgment.

Boyd, C.

As to what persons are liable in regard to business entered upon by the subscribers to a projected company, the accurate rule is suggested in the judgment of Cranworth, V.-C., in *Carrick's Case*, 1 Sim. N. S., at p. 509, 510: "Evidently those who had given the orders under which the debts were incurred, or who had sanctioned the giving of such orders by others. No one could be liable unless either the creditor could say to him, 'My debt was incurred under an order given or sanctioned by you,' or unless the party liable to the creditor could say to him, 'I incurred this obligation under your engagement to contribute rateably with me.' No person, by agreeing to take shares in the company when formed, enters into either of these engagements. He neither gives orders for acts to be done in or towards forming the company, nor authorizes others to give such orders on his account, nor agrees to indemnify or to contribute towards indemnifying those who do so." This was approved as authority by Parke, B., in *Bright v. Hutton*, 3 H. L. C., at p. 369.

The whole body of proposed corporators are not necessarily liable as partners in the case of the prosecution of business prior to incorporation, for the whole concern is not a partnership in that sense; but it is a *quasi* partnership in this sense, that all those who take a practical part in the prosecution of the business or who sanction or ratify the conduct of affairs become liable as partners. The extent or proportion of liability between themselves depends upon the extent of their interest as manifested in their subscription for shares; on this footing the profits and losses would be proportioned among them. The practical difference as to evidence is that in the case of partners all would be liable without notice of the obligation incurred; in the other case some evidence must be given to shew knowledge or notice and assent on the part of each person to be charged.

Agreement, May 12th, 1892, between E. C. Walker,
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Judgment.
Boyd, C.

trustee, of the first part, and ten others, of whom are the appellants Conklin, McKay, and Doan, by which all the parties agreed to purchase the steamer "Imperial" for \$7,000, to be held by the said Walker as trustee for the parties to the agreement and others who may become stockholders in a company proposed to be incorporated under the Ontario Joint Stock Company Limited Act, with capital of \$7,000, divided into 700 shares of \$10 each. The steamer was to be secured at once, in order to commence running between Kingsville and Pelée Island. The parties of the second part agreed to indemnify the trustee from all loss, charges, damages and expenses in connection with the trusteeship, and from any liability in connection with the running, management, or otherwise, of the said steamer. One of the ten named, the appellant Dease, does not sign, but as he was employed to run, and did run, the boat as master and signed other papers, there is no doubt he is bound as much as if he had signed the first agreement. A schedule of stock to be taken by him and the others is annexed, and for this stock he and the others did subscribe.

The next agreement dated May 16th, 1892, is signed by Dease: this provides for meeting the payments on the steamer in case of deficiency, and it speaks of the parties thereto as being instrumental in organizing the said company to be called "The Kingsville and Pelée Navigation Company, limited." The next agreement of May 27th, 1892, is also signed by Dease, the appellant, reciting that it has been deemed advisable to purchase the steamer "Imperial" in advance of the said incorporation.

The next writing is a formal document of January 5th, 1893, signed by the subscribers to the stock of the "Kingsville and Pelée Navigation Company," Walker trustee for the said subscribers, and the Lake Erie and Detroit R. W. Co. This is signed by forty-one subscribers apart from Walker, the trustee. Among them are the appellants L. S. Brown (Brown & Wigle), Conklin, Doan, Gregory, Leggatt (Leggatt & Wigle), Mc-

Kay, Ulch, and Wicle—all but Dease. This recites that the said subscribers are with others the owners of the steamer "Imperial," subject to the several charges thereon, the said steamer being held in trust by Walker subject to the terms of the agreement of May 27th, 1892, which is incorporated therewith, and that the subscribers in advance of the incorporation of the company are desirous and have agreed to sell the steamer, and then it proceeds to direct the trustee to sell to the railroad the steamer and all their and each of their interests therein. They provide for the railway assuming all charges now upon the steamer, and all sums due to their trustee in respect of the said trust up to the purchase price, and that the balance of the price be held by Walker upon the same trusts as theretofore. This was not carried out by a sale, but it very significantly shews the position and knowledge of the subscribers under their own hands and seals.

Judgment.
Boyd, C.

The stock book was opened on May 12th, 1892, and the names of 52 subscribers appear thereto; the last subscription being on July 18th. The first meeting of "stockholders" was on July 6th, at which date there were 50 subscribers to the stock list. Provisional directors were then appointed on motion seconded by the appellant Doan, and of those named Grenville, Dease and Brown, were there. It was decided at that meeting to take possession of the Pelée dock and to build a warehouse thereon.

At a meeting of the provisional directors on August 19th, it was resolved that the secretary notify Mr. Brown that if he puts his dock in proper repair and erects a warehouse, that the Imperial will make regular trips thereto, and it was also then provided that a schedule of tariff rates be issued, etc. On August 23rd the provisional directors resolved that a purser should be at once appointed on the Imperial, and that James Malott be engaged as purser at a salary of \$20 a month.

At a meeting of directors on September 13th, 1892, it was agreed that the lease made by Conolly to Grenville of the west docks on Pelée Island be assumed by this com-

Judgment.
Boyd, C.

pany, and that the costs and payments entailed by Grenville as lessee of the dock be also assumed, and that the dock should be conveyed to the company. Those present were L. Malott, F. Green, W. Woollatt, and Grenville. Dease was there, but did not remain.

Chas. Leggatt was then appointed manager of the steamer Imperial, who was to give all instructions as to the running of the steamer.

The provisional directors on October 18th, 1892, directed the calling of a general meeting of stockholders, and such a meeting was held on November 22nd, 1892, to consider the proposal for the purchase of the steamer by the railway. It was stated that if the railway purchased a controlling interest in the stock they would take the management of the business in their own hands.

The secretary then read a statement of the affairs of the company, shewing the liabilities to be about \$3,400, irrespective of what had been paid on account of the boat.

Conklin moved, seconded by Doan, that S. Wigle and S. L. McKay be appointed auditors to audit all the books.

December 10th, 1892, at directors' meeting, S. L. McKay was appointed secretary-treasurer till the next general meeting.

It was next resolved, that a general meeting should be held on December 19th for the purpose of receiving the auditors' report and other business.

On December 19th, 1892, the general meeting was held in the town hall, and the auditors' report was submitted, read and adopted. Wigle was present, also Brown, Doan, Ulch, Gregory and McKay, and all took part in the proceedings. Altogether it is said by Gregory that over forty were at this meeting.

It was moved by Grenville and seconded by Wigle, and carried, that this company assign their claim of the west dock to the railroad company on the same terms as the boat.

December 29th, 1892: Directors' meeting as to dockage,

west dock, *re* Grenville and McCormick, as to offset one claim against the other—L. Malott, Grenville, Woollatt, and Green present.

Judgment.
Boyd, C.

January 5th, 1893: Directors resolved to pay Grenville claim of note and legal executions, also to pay \$125 on note due December 31st at Walkerville—(same directors present).

June 12th, 1893: Meeting read charter of incorporation for \$9,000 capital.

Doan moves that meeting approves and assumes responsibility for Walker's acts as trustee.

These appear to be all the material entries to be found in the records of the company's proceedings, though it is said much was done and ordered which is not there set forth.

Malott, in his evidence, says that it was well known in Kingsville that the boat had been purchased and was running from 1st to 6th July; that the meeting of July 6th was largely attended by about two-thirds of the shareholders, and they started to run the boat without being incorporated. All the shareholders, he says, knew that the boat was running.

Woollatt says that the provisional directors were to take charge of the boat and give directions (*i.e.*, for its management and use). These provisional directors acted for all the subscribers, and profits, if earned, would have gone into their pockets.

As to the different appellants and their attitude as to the running of the steamer, it appears affirmatively that there were present at the first meeting of subscribers in July, S. L. Brown, Conklin, and Doan, which was practically the inaugural meeting for the beginning of business.

The results in brief are that the steamer was purchased for the benefit of all the shareholders and held by Walker as trustee for them; the boat was run for their benefit in advance of incorporation, as all knew; all were aware of these operations, and all admit under their hands that they are jointly interested in the steamer.

Judgment.

Boyd, C.

Many of the appellants—most of them—take part more or less in the operations of the company, attending meetings and directing affairs on the steamer or in the conduct of the office business ; all would have expected to share in the profits had any been made, and thus, I think, all became liable to contribute to the coal bill incurred in running the steamer. This was a necessary expense, and it was incurred by the captain or manager of the boat, he telling the plaintiffs that the company was not incorporated, and that Walker, who paid the plaintiffs, was trustee of the boat.

The payment of this coal bill was not a voluntary act, but one which it was proper for the trustee of the boat to do, and in the interests of the parties jointly interested, to relieve her from the lien which might otherwise attach upon the vessel.

The appeal fails as to those who seek to be relieved from liability to contribute.

The appeal of Arthur Woollatt should not be entertained to its full extent. So far as this coal claim is concerned all the subscribers to the stock (not now parties) who were aware of the operations of the steamer and either approved of it or ratified it by some act apart from the mere subscription of stock, should be brought in as contributories to this claim.

But the scope of this reference should not be extended to other claims not presented in the pleadings, though others there may be in which there is common liability to a greater or lesser extent.

There should be no costs of this appeal.

MEMO.: In this case I think contribution should be without reference to what has been paid on each share ; the liability does not arise in respect of calls upon the shares, though the amount of shares subscribed by each may well regulate the quantum of contribution as between those jointly liable: *Thompson v. Williamson*, 7 Bli. N. R. 432, 444.

FERGUSON, J.:—

Judgment.

Ferguson, J.

In delivering the answer of the Judges in the case *Bright v. Hutton*, 3 H. L. C., at p. 369, Baron Parke said: "All the questions of contributories resolve themselves into two simple questions of fact: 1st. Of by far the most frequent occurrence, did the alleged contributory make, or authorize to be made, the contract, in respect of which he is called on to contribute, on his account, jointly with others? or, 2nd., if any one or more entered into the contract in his own or their behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequences of the contract?"

On the same page, the learned Judge says: "We consider the law to have been most correctly laid down by Lord Cranworth in *Carrick's Case*, 1 Sim. N.S. 509."

In the last mentioned case, Lord Cranworth asks the question: "Who then were the persons liable to pay the debts incurred in the attempt to form the company?" and he answers, "evidently those who have given the orders under which the debts were incurred, or who had sanctioned the giving of such orders by others. No one could be liable unless either the creditor could say to him: 'my debt was incurred under an order given or sanctioned by you;' or unless the party liable to the creditor could say to him: 'I incurred this obligation under your engagement to contribute rateably with me.' No person by agreeing to take shares in the company when formed, enters into either of these engagements."

After having perused all the authorities referred to on the argument of this appeal, and considered the matter as well as I have been able, I am of the opinion that these are the principles of law that apply in considering and determining whether or not a person whose name appears in the list of subscribers for stock in the then proposed or contemplated company, is liable to contribute towards the price of the coal purchased from the plaintiff for consumption and consumed on the boat "Imperial" (the subject of this action).

Judgment. I have perused the various documents in evidence; the minutes of the meetings of shareholders, or rather of those who had subscribed for stock, and the other evidence, intending to give a brief synopsis of it here, but I now think this last not necessary, and indeed useless, as the Chancellor in his elaborate judgment has given what I think a very good epitome of all; and I fully agree in results as stated by him, namely, that the boat Imperial was purchased for the benefit of all subscribers for stock, and held by the defendant Walker in trust for them; that the boat was, with their knowledge, run for their benefit in advance of incorporation of the company; and that they were all aware of the operation of the boat.

Ferguson, J.

It appears by one of the documents that no less a number than forty-one of these subscribers for shares, admit and state over their hands and seals, that they were jointly interested, and these embrace all or nearly all the appellants here.

The learned referee, as we were told, refused to add parties, and he seems to have dealt with only the sixteen defendants on the record at the time of the consent reference to him.

The case should, I think, be referred back, and all subscribers for stock who are not now parties, and who, according to the rules stated by Lord Cranworth above referred to, are liable, should be made parties. In other words, all subscribers for stock who were aware of the operation of the boat, and who either contracted or authorized or approved of or ratified what was done by some act, not being a mere subscription for stock, should be made parties if not now parties. These, I agree in saying, should be made to contribute towards the payment for the coal, which will now be contribution towards the reimbursing and indemnifying Mr. Walker.

It may be that some of them are insolvent or out of the jurisdiction, and if such is the fact, each case as it arises, can be dealt with according to the proper practice.

I am of the opinion that those who have appealed, seeking relief from liability, have failed in their appeals.

The contention based upon the fact of having paid Judgment wholly or in part the amount subscribed for, cannot, I Ferguson, J. think, succeed. Creditors have, as I think, in the circumstances, no concern with this.

I do not see that, on this appeal, the position of the defendant Dease or that of the defendant Brown, is legally any better than the positions of the others who seek relief from liability.

I do not see that there is any ground for the contention that the payment of the plaintiff's claim by the defendant Walker, was a voluntary payment by him. It was a payment that would have been properly made by him in the first instance.

I do not see that the scope of the reference can properly be enlarged so as to embrace matters not appertaining to the claim for the price of the coal sued for by the plaintiff. The consent reference seems to me to be confined to this, including, of course, the costs paid by the defendant Walker to the plaintiff.

It is, I think, not necessary to deal more specifically with the various grounds of appeal.

There should be no costs of this appeal.

ROBERTSON, J., concurred.

A. H. F. L.

RE TORONTO, HAMILTON, AND BUFFALO RAILWAY COMPANY
AND BURKE ET AL.

*Railways—Arbitration—51 Vict. ch. 29, sec. 150 (D.)—"Opposite Party"
—Mortgagor and Mortgagee.*

The words "opposite party" in sec. 150 of the Dominion Railway Act, 51 Vict. ch. 29, sec. 150, must be read so as to include both mortgagor and mortgagee, and both must concur in the appointment of an arbitrator to determine the compensation to be paid for mortgaged land required for the railway.

Statement. CERTAIN land being required by the company for the purposes of their railway, they served upon Burke, the owner of the equity of redemption, and Farr, the mortgagee, the usual notice under sec. 146 of the Dominion Railway Act, 51 Vict. ch. 29, containing a description of the land required, a declaration of readiness to pay a certain sum as compensation, and the name of a person to be appointed as the arbitrator of the company, if their offer should not be accepted. The mortgagee accepted the offer, but the owner of the equity did not, and appointed an arbitrator on his behalf. The two arbitrators so appointed, jointly appointed a third, and the board thus constituted proceeded to take evidence.

The company, however, not being satisfied that the proceedings were regular, made a motion under sec. 150 of the Act, for an order appointing a sole arbitrator, as in a case of default of appointment by the land-owner.

Section 150 provides: "If, within ten days after the service of such notice, or within one month after the first publication thereof, the opposite party does not give notice to the company that he accepts the sum offered by it, or does not give notice to it of the name of a person whom he appoints as arbitrator, the Judge shall, on the application of the company, appoint a person to be sole arbitrator for determining the compensation to be paid as aforesaid."

The motion was heard by MEREDITH, C.J., as "the Judge" named in the section, on the 14th July, 1896.

D'Arcy Tate, for the company.

Statement

Teetzel, Q. C., for Burke.

P. D. Crerar, for Farr.

July 14, 1896. MEREDITH, C. J. :—

The words "opposite party" in sec. 150 must be read distributively so as to include both mortgagor and mortgagee, and both not having concurred in the appointment of an arbitrator, the position is the same as if no arbitrator had been appointed by the land-owner. An order should therefore be made appointing a sole arbitrator.

E. B. B.

STEPHENSON V. VOKES.

Company—New Stock—By-law for Allotment by Shareholders—Right of Directors to Allot—Directors—Duration of Office—By-law—Right of Shareholders to Vary at Special General Meeting—R. S. O. ch. 157, sec. 37.

Where a by-law is passed at the annual general meeting of a joint stock company providing for the allotment of certain new stock by the shareholders, the directors have no power to pass a by-law directing its repeal and providing for the allotment by themselves.

At a meeting of the directors of a company a by-law, under section 37 of R. S. O. ch. 157, was passed, and subsequently confirmed by the shareholders, providing that the directors should hold office for one year and until their successors were appointed :—

Held, that the by-law so passed could only be repealed at the next annual general meeting of the company, and therefore a by-law passed during the directors' year of office, by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid.

THIS was an action tried before STREET, J., at the Toronto non-jury sittings, on 31st March, 1896.

The facts, so far as material, were as follows :

The Toronto Lock Company Limited, one of the plaintiffs in this action, were incorporated in October, 1893, under R. S. O. ch. 157, with a capital of \$3,000, divided into thirty shares of \$100 each. On 21st March, 1895,

Statement. the directors passed a by-law for increasing the capital stock to \$25,000, and this by-law having been duly confirmed by the shareholders, supplementary Letters Patent were issued on 24th June, 1895, to increase the stock in accordance with the by-law. By the terms of the by-law upon which the increase was founded, it was provided that the new shares should be issued and allotted as follows: twenty-one shares as the directors should deem proper for the benefit of the company, and the remaining 199 shares as a majority of the shareholders at any general meeting of the company duly convened, should thereafter determine. On the 23rd July, 1895, the directors met and allotted the twenty-one shares of new stock with which the by-law authorized them to deal.

At a meeting of the directors, held 5th October, 1895, certain existing by-laws were repealed and new ones were passed in their stead, by which it was *inter alia* provided that directors should hold office for one year, and until their successors should be elected: that by-laws might be amended, altered, or repealed; but only by a vote in favour of such amendment, alteration, or repeal, representing at least a majority of the total number of shares subscribed from time to time.

The annual meeting of shareholders was held on 19th October, 1895, at which these by-laws were confirmed, and the plaintiff T. H. Stephenson and the defendants Miles Vokes and Robert Oxenham, were appointed the directors of the company; Miles Vokes was elected president, and Robert Oxenham, secretary of the company on the same day.

Subsequently four shares of the 199, were allotted by the directors, and the allotment was confirmed by the shareholders at a meeting duly called.

A special shareholders' meeting was called by the plaintiff Stephenson on 11th January, 1896, under sec. 39 of R. S. O. ch. 157, for the purpose of amending the by-law with regard to the term of office of the directors, by making it terminable by resolution of the shareholders at a meet-

ing called for the purpose; and also for the purpose of Statement. passing a resolution terminating forthwith the tenure of the existing directors, and electing others in their stead. On the day for which the meeting of shareholders was called, the directors held a meeting and passed a by-law repealing so much of the by-law for increasing the capital stock as placed the allotment of the 199 shares in the hands of the shareholders, and providing in lieu thereof, that the directors might allot the same. After passing this by-law, and before the shareholders' meeting, the directors proceeded to allot five shares to Miles Vokes, who paid to the company \$500 for them and subscribed for them.

At the shareholders' meeting, the by-law for making the tenure of office of the directors terminable by resolution, was put to the meeting and declared by the chairman, Miles Vokes, to have been lost upon the following vote: For the by-law, 24; against it, 30. In arriving at this vote, the chairman counted the vote upon the five shares allotted to him by the directors on that day, and rejected five votes cast by the plaintiff Stephenson upon a proxy in his favour from one Bedson.

The resolution, removing the existing directors and appointing in their place the plaintiffs Stephenson and Mulvey, and the defendant Oxenham, was then submitted and declared lost upon the same division.

After the meeting, the defendant Oxenham fearing that the plaintiffs Stephenson and Mulvey would attempt to take forcible possession of the office of the company, with the assent of the defendant Vokes, removed the books to his own house, and a watchman was placed in charge of the premises by the defendant Vokes; but notwithstanding this precaution, the plaintiffs Stephenson, Mulvey and defendant Vokes, succeeded in the course of the night, in obtaining possession of the premises.

The five shares of stock in respect of which the plaintiff Stephenson tendered the proxy of Bedson, stood in the books of the company in the name of Bedson; he had,

Statement. however, agreed to sell them to Stephenson, but the transfer had not been recorded in the company's books, and no application to record it had been made to the directors, whose consent was necessary under the by-laws of the company, before a transfer could be made in the books. It was stated in the argument that the proxy had been rejected on the ground that, although the shares appeared on the books of the company in Bedson's name, he really was not the owner of them, and, therefore, could not give a proxy even to the beneficial owner, although the latter was a shareholder in respect of other shares.

This action was brought on 13th January, 1896, by Stephenson, Mulvey, and the company against Vokes and Oxenham, asking to have it declared that the directors could not lawfully alter the by-law under which the stock was increased, so as to give themselves power to allot the new shares; and that their allotment of five shares to Miles Vokes was illegal: that the defendant Vokes should have rejected the five votes cast by him in respect of such shares, and should have allowed the five votes cast by Stephenson as proxy for Bedson, and should have declared that the by-law for terminating the term of office of the directors submitted to the shareholders' meeting of 11th January, 1896, and the resolution removing the existing directors and electing the plaintiffs Stephenson and Mulvey and the defendant Oxenham in their stead, had been passed; and for a declaration that the said plaintiffs and the defendant Oxenham were duly elected directors of the company at the said meeting; and for an injunction restraining the defendant Vokes from interfering as a director or as president; and for an order directing the defendant Oxenham to deliver to the plaintiffs the books of the company.

By an agreement, dated 16th January, 1896, between the parties, it was agreed that the defendant Oxenham should return the books of the company to the office without prejudice to their respective rights, and this was done.

The defendant Vokes in his statement of defence, alleged Statement. that he purchased the five shares of new stock in good faith, believing he had the right to do so, but did not insist upon the validity of the allotment, and was willing that it should be declared not to have been duly issued, but he submitted that the \$500 paid for it should be returned to him by the company. He further submitted that he had never been removed from the office of director, and that he still held such office; and that the plaintiffs Stephenson and Mulvey were not entitled to use the name of the company as plaintiffs.

The defendant Oxenham alleged that he was elected a director of the company and its secretary on 19th October, 1895, and had the custody of the books of the company; that the resolution removing him from his office of director, having been declared lost, he was entitled to retain the books, and that he removed them to ensure their safety; and he submitted that he had done nothing wrong.

Mulvey, and McBrady, for the plaintiffs.

S. H. Blake, Q. C., and Denton, for defendant Vokes.

Bicknell, for defendant Oxenham.

April 13th, 1896. STREET, J.:—

The by-law for increasing the capital stock of the company, prescribed the manner in which the new shares should be allotted in accordance with the second sub-section of the 18th section of the Act, R. S. O. ch. 157, and provided that the allotment should be made, save as to twenty-one shares, by the shareholders. This by-law was sanctioned by the shareholders at a general meeting in the manner required by the 21st section of the Act, and it was the basis of the new issue. It was not competent for the directors to violate its provisions by assuming to allot the shares without the authority of the shareholders who had reserved to themselves the control of the allotment; and the form which the directors went through of passing a

Judgment.

Street, J.

by-law to justify the act, does not help the matter, for they had no authority to pass such a by-law. The allotment of the five shares by the directors to Miles Vokes on 11th January, 1896, was, therefore, beyond their powers, and he must be ordered to release them to the company, and the allotment of them must be declared to have been invalid and of no effect. At the same time he is entitled to a judgment against the company for the recovery of the \$500 paid for the shares, with interest from the time it was paid. I think this is a more desirable way of dealing with the matter than to allow him to retain the shares until his money is repaid to him, for that would entitle him to vote upon them in the meantime.

Then with regard to the five shares standing upon the books in the name of Bedson, but which he had sold to Stephenson, I think the defendant Vokes, the chairman of the meeting of shareholders on 11th January, 1896, was clearly wrong in rejecting the proxy held by Stephenson from Bedson. Both the registered owner and the beneficial owner of these shares, concurred in agreeing that the latter should vote upon them, and there was no reason for disfranchising both of them. I think the proxy given by Bedson to Stephenson, entitled the latter to vote in respect of them.

I am of opinion, however, that the shareholders had no power to pass a by-law amending the existing by-law regulating the term of office of the directors. It is true that in the absence of any provision to the contrary, in a charter of incorporation, the right to make by-laws for the management of the company, is no doubt vested in the whole body of shareholders; but it is competent for the power creating the corporation to vest the power in a select body, and that has been done in the Act under which this company has been incorporated, by providing that the directors may pass by-laws for certain purposes specified in the Act. Under section 37, sub-section (c), the term of office of the directors is to be dealt with by by-law to be passed by them. The directors of this company

exercised this power by passing a by-law which provided that the term of office should be one year, and this by-law was confirmed at the annual meeting held on 19th October, 1895, at which the defendants and the plaintiff Stephenson were elected.

Judgment.
Street, J.

The shareholders having confirmed this by-law, were bound by it and could not themselves pass another one to alter it; they must wait until the next annual meeting and put in a new set of directors who would pass a new by-law. See 2 Kyd on Corporations, 100; Angell & Ames on Corporations, 11th ed., pars. 325-6-7.

The action of the plaintiffs, Stephenson and Mulvey, therefore, in forcibly ousting the defendants from the control of the company and taking it upon themselves, was, therefore, entirely unjustifiable, and there must be a declaration that the defendants Vokes and Oxenham and the plaintiff Stephenson, are the directors of the company for a year from the 19th October, 1895, and until their successors are elected. If there was an undertaking for damages when the plaintiffs obtained, as it was stated they did, an injunction to the hearing, the defendants may, if they wish, but at their risk of costs of the reference, take a reference as to the damages.

The interim injunction, if any, will be dissolved, and the plaintiffs Stephenson and Mulvey must pay the full costs of the motion for injunction, and one-half of the other costs of the defendants. I make this order as to costs because, although both parties have been in the wrong, the plaintiffs Stephenson and Mulvey have improperly usurped the control of the company's affairs, and have improperly made the company a party plaintiff.

The injunction restraining the sitting directors from interfering with the affairs of the company, seems to be at variance with the authorities upon which *Chaplin v. Public School Board of Woodstock*, 16 O. R. 728, was decided.

G. F. H.

[DIVISIONAL COURT.]

RE YOUNG.

*Will—Execution—Attesting Witnesses—Inability to Procure Proof by—
Other Sufficient Evidence—Letters after Execution—Admissibility.*

Where the Surrogate Judge is satisfied of the inability to furnish proof of the execution of a will by the attesting witnesses, it may be proved by other sufficient evidence.

A will in testator's handwriting and signed by him was found in a place where testator was accustomed to keep his papers, it being so signed in the presence of two persons, who signed as witnesses, the handwriting being apparently that of two persons and distinct from that of the testator, and who, though due search was made for them, could not be found, this being attributable to their being strangers, testator being under the belief, from the misreading of a text book on wills, that strangers were the best witnesses. The Surrogate Judge being satisfied as to the inability to procure proof by the witnesses, and that the due execution of the will had been proved by other evidence, admitted it to probate. On appeal to the Divisional Court the judgment was affirmed. *Per* BOYD, C.—Where the will is itself in evidence with the testator's and witnesses' signatures thereon, post-testamentary letters of the testator are receivable in evidence to enable the Court to come to a right conclusion.

Statement.

THIS was an action tried before the Judge of the Surrogate Court of the county of Wentworth, on the 10th and 23rd of March 1896.

It was brought by William Armstrong and Samuel Hunter, the executors under the alleged will of Thomas Murray, deceased, who in his lifetime resided in the city of Hamilton in this Province, to have probate thereof declared in solemn form of law.

The alleged will was found with other papers of the deceased, in a place where he was accustomed to keep letters ready to post and other parcels.

By the alleged will, Thomas Young purported to give, with the exception of a bequest of \$500, to his daughter Mrs. J. R. McDougall, all his property in this country "to Theresia Atkins, my intended wife," naming the property and appointing the plaintiffs his executors. The will was in the handwriting of Thomas Young, and was signed by him, and purported to be so signed in the presence of two

witnesses, H. E. McElligott and John Allan. No evidence was produced by anyone that they ever knew these witnesses, or either of them, and they could not be found, although every reasonable effort was made to find them. No other person appeared to have been present when the will was executed. On the day on which the alleged will bore date, the deceased was seen with two strangers, whose names he mentioned to a man named Barlow, with whom he was boarding; the names he gave being the names of the witnesses to the will. It was shewn that the plaintiff in 1891, had gone to Ireland with reference to property to which his right was contested, and he had to take legal proceedings there, and while the litigation was going on, which was about two years and four months, he remained in Ireland and boarded at the house of the principal devisee's father, and became engaged to be married to her. To carry on the law suit, the principal devisee and her brother lent him £200 each.

Statement.

After his return to Hamilton, he frequently corresponded with the devisee, and letters were produced from the deceased to her, in which he enclosed her money to pay her passage out to Canada, and in which he referred to the approaching marriage, and as to his having made provision for her, and as to the execution of a document in the presence of two witnesses.

The letters, so far as material, are set out in the judgment of Boyd, C.

A book on wills was found in deceased's trunk after his death, which contained this sentence: "Strangers of a respectable character and rather young, are about the best witnesses a testator can have."

The deceased and the principal devisee were to have been married on the 17th of September, but two days before the marriage was to take place, he was accidentally run over by a train and killed.

The learned Surrogate Judge, at the conclusion of the case, delivered the following judgment:—

Judgment. March 24th, 1896. SNIDER, Sur. J. :—

Snider,
Sur. J.

As to the facts in this case, I find that the paper writing exhibit 5, is all in the handwriting of the deceased Thomas Young, excepting the two signatures H. E. McElligott and John Allan, and that the signature Thomas Young at the end thereof, is the proper handwriting of Thomas Young the deceased, and was there subscribed by him for the purpose of executing this paper, as and for his last will and testament, fully understanding the whole purpose and transaction.

I further find that this paper was found with other papers of his in a place where he was accustomed to keep letters ready to post and other parcels. There is not, in my opinion, the least suspicion or doubt in connection with the whole transaction. convinced that it is his genuine last will and testament made just as he of his own free will wished and intended it to be.

I further find that the signatures H. E. McElligott and John Allan, are not the handwriting of the said Thomas Young deceased; and that they are not the handwriting of any one person, but are the handwriting of two persons, neither of whom was the deceased.

I find that the deceased knew how a will should properly and legally be executed and subscribed, both by the testator and the witnesses, and that having this knowledge he undertook and intended to properly execute and complete exhibit No. 5 as his will, and that he supposed he had succeeded in completing it in a legal and binding way. The question then arises whether sufficient proof has been given to warrant me in granting an order for probate. If I cannot, it is not because the statute ch. 109, sec. 12, R. S. O., has not been complied with, for I am well satisfied that in this case, it has been fully complied with, but because the proof is insufficient. It is, therefore, reduced to the one question of sufficiency of proof. The witnesses McElligott and Allan cannot be found. No one who has been before me, ever knew them or either of them.

No trace can be found of them or either of them; and I find that every reasonable effort has been made to do so, without success. No other person was present, so far as is known, when the will was executed. I have received evidence which shews that deceased was spending the day on which the will bears date, with two men who were strangers to those who saw them, and whose names he mentioned to Barlow, being the names subscribed. This renders possible the facts set up.

Judgment.
Snider,
Sur. J.

Another branch of evidence was received by me, though objected to by counsel for the defendants; that is, the letters of 26th June, 15th July, and 12th of September, exhibits "2," "3," and "4." These are all proven to be in the handwriting of the deceased. I have received them as being relevant as tending to prove by the statements therein made, the genuineness of the signature "Thomas Young" to this will, and as identifying the document. I think the letter of the 26th June, exhibit 2, written before the will was executed, should also be received as containing a general statement or synopsis of what he intended to do by his will.

If exhibit No. 3, the letter of 15th July, 1895 (proved to be in the handwriting of the deceased and received in Ireland by Miss Atkins), can be received as evidence, it shews that these two witnesses were both present when Young signed his name to what he describes there as "a document which makes everything right," etc. Sealed up with exhibit No. 4, also proven to be in the handwriting of the deceased, is found this document identified as the one referred to in exhibit 3, by the description of the witnesses given in each. Now I am asked to refuse to receive these letters in evidence, on the ground that having been written after the will was executed; no statement made in them by the deceased, can be given in evidence of execution according to statute. I think they are admissible to prove that the signature, Thomas Young, is the true signature of deceased, and to identify the document. And relying on *Re Malins*, 19 Ir. R. Ch. (1887), 231, and *Clarke*

Judgment. v. *Clarke*, 5 Ir. R. Ch. (1880), 47, where similar evidence was received? I further hold the statements therein made as to the circumstances under which deceased wrote his name to the will, are also admissible in evidence.

Snider,
Sur. J.

In this case a further reason for receiving the letter of July 15th, 1895, in evidence, is that the letter of 26th June, promises to secure and provide for Miss Atkins as she was starting for America to become his wife, in case he should die before their marriage. The execution of this document as his will, if properly executed, was carrying out the promise of the letter of the 26th of June; and the letter of the 15th July, also to her, announced the fulfilment of the promise, and the way in which it had been done. This seems to me one continuing act, completed only when the letter of 15th July was written, which letter as part of this one continuing transaction should be a declaration admissible in evidence. See Taylor on Evidence, 8th ed. sec. 1137; *Re Ripley*, 1 Sw. & Tr. 68; and *Doe d. Shallcross v. Palmer*, 16 Q. B. 747, are quoted as authority for excluding the letter of 15th July, 1895, because it is a declaration made after execution of the will. Lord Campbell, C. J., says, at p. 757: "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires."

But the learned Judge is not deciding the point in that case, and that there are exceptions is made clear by the evidence received in the later cases of *Re Malins*, 19 Ir. R. (1887) Ch. 231, and *Clarke v. Clarke*, 5 Ir. R. (1880) Ch. 47.

If I am correct in receiving this letter of the 15th July, in evidence, it states clearly that both of these witnesses, whom he there describes, "witnessed him sign" this paper; and as he only signed once, they must have been present at the same time. There is this further evidence that the words "witnesses present," which words upon the whole, I think were written at the same interview, are consistent with the proper execution and inconsistent with any other view.

Further, the general result of the authorities is, that under facts such as here exist, due execution will be presumed by the Court in case the signatures of the testator and the witnesses be satisfactorily proven: *Re Malins*, 19 Ir. R. Ch. 231; *Clarke v. Clarke*, 5 Ir. R. Ch. 47; Theobald on Wills, 4th ed., p. 69.

Judgment.

Snider,
Sur. J.

There remains the question as to proof of the signatures of the witnesses. Surrogate Rule 10 requires proof from one of the witnesses, or where as here, the absence of both witnesses is accounted for by other proof to the satisfaction of the Judge. The other proof usually given is evidence of the signatures by some person who knows them. The signature of the testator is regularly and sufficiently proven. There is nothing in section 12, of R. S. O., ch. 109 making it necessary that either witnesses shall be personally known to some one who can give evidence. They may be as here strangers to every one that can be discovered. As long as two persons are attesting witnesses, the Act would appear to be complied with.

Now it is well established by expert testimony, that these two signatures of alleged witnesses are the handwriting of two persons, and not of one person; and that the deceased Thomas Young did not write either. Two persons, therefore, neither being the testator, must necessarily have signed this paper under the heading, "witness as present."

The signature of the testator having been proved to be genuine, I cannot see why there is not sufficient proof of the handwriting of the two other persons being subscribed as witnesses, and, therefore, that two persons witnessed the execution of the will, and subscribed as such.

Neither the statute nor rule seems to require the plaintiffs to go further and prove that these persons and their handwriting, are known to some one who has given evidence: *Clarke v. Clarke*, and *Re Malins*, seems to me to cover all the difficulties arising in this case.

I have gone thus fully over the points argued, and have examined all the authorities submitted to me on both sides,

Judgment. because the main facts in *Williamson v. Williamson*, 17
O. R. 734, are exactly the same as in this case, and the
Snider, learned Judge refused the order for probate.
Sur. J.

If I understood that decision to be, that evidence, such as has been given in this case, is not sufficient, no matter how conclusive, I should of course follow it; but I do not so understand it. No evidence at all was submitted, and the Surrogate Judge had held that the evidence given before him did not satisfy him. The parties interested all consented, and on this consent alone, the learned Judge was asked to grant the order; and as he pointed out, an order was rendered unnecessary by this very agreement. In this respect the case is quite different. I, therefore, hold that exhibit No. 5 is the duly executed and attested last will and testament of Thomas Young deceased, and I order that probate of it be granted.

The costs of all parties should, I think, be paid out of the estate, and I so direct.

From this judgment defendants, on the 12th of May, appealed to the Divisional Court, composed of BOYD, C. FERGUSON and MEREDITH, JJ.

E. D. Armour, Q. C., for the appeal.

P. D. Crerar, for the respondents.

June 5th, 1896. BOYD, C. :—

This is a case in which I am not prepared to disagree with the conclusions of the Surrogate Court that probate may be granted. The will of the deceased is produced and appears to be holographic. It is proved that the testator was well aware of what was needed for the proper execution and attestation of a will. His signature to it and his writing is proved to the satisfaction of the Judge, and on its face it appears to be signed by him with two "witnesses present," whose names also appear subscribed. It is dated 27th June, 1895, and on the day before he

writes a letter to the chief beneficiary in Ireland—Miss Atkins, to whom he was about to be married—in which he alludes to the will in this way: "I wish to tell you I am fixing things all right so as I will have provision made for you, as I wish to protect you in every way lies in my power. I have a document ready for me to sign, but it is necessary for me to do so in the presence of two witnesses, and I think I have run across about the right party for the present. I am to meet them to-morrow and have things made all right until you come here, then when we are married I will have to make some changes." * *

Judgment.
Boyd, C.

It is to be noted that he was killed on the railroad two days before the time appointed for the marriage in September.

In a letter dated 15th July the testator writes to the same person in these words: "I am glad to tell you I have all things secured and my mind is easy. I was lucky in meeting an old acquaintance and a friend of his on the morning of the day I last wrote you. They were passing through the city, just, however, when I met them they settled to stop until the next day, and I passed most of the time in their company going round before they left. Next day I had both of them to witness me sign a document which makes everything right until you come. * * When you come and we are married I will have to make some changes, which I will consult the Whites about."

This reference to "the Whites" is explained by a subsequent letter, addressed to "White & White, solicitors in Dublin," in which the will now propounded was enclosed, though the letter and its enclosure were not forwarded to Ireland, but were found after the death in the testator's house. This letter is dated 12th September, and in it he says: "I now wish to let you know I have settled all my property here on her" [Miss Atkins] "before she got out; and I enclose you my will and will be very much obliged by you sending me a copy of how it is to be when Miss Atkins becomes my wife, which we have settled to be on Tuesday, 17th. * * I told the parties who witnessed me "

Judgment.

Boyd, C.

sign my will what it was. They do not reside in this city [Hamilton]; "they were on a trip seeing this section of the country. I was acquainted with one of them some years back. I did not wish the people round here to know at present my business."

Now these letters are proved to be written by the deceased to the satisfaction of the Court below, and the Judge gives credit to the testimony of the witnesses called by the respondents. It is proved that the testator was seen in the company of two strangers at the date in question, and that the deceased gave their names as McElligott and Allan. That agrees with and so far confirms the actuality of the names of the witnesses, as subscribed to the will.

The respondents have endeavoured to trace these men but hitherto in vain, though the Judge is satisfied that all reasonable efforts have been made. The estate is not of such magnitude (some \$2,000) as to justify the incurring of any heavy expense in this kind of search, unless it is absolutely necessary to have further evidence or further lapse of time before granting probate. But I favour the view taken by the Judge that the circumstances are sufficient in this case to justify the presumption that all the statutory formalities have been observed. There is no undeviating course of evidence in these testamentary cases: *Myers v. Gibson*, 14 W. R. 901. The testator had evidently imbibed a whimsical idea that "strangers" were the desirable witnesses from a misreading of the text of a legal manual found in his trunk after death, where he pencil marks this sentence: "Strangers of respectable character and rather young are about the best witnesses a testator can have"—the meaning being strangers to the family—outsiders, and not those transiently visiting from foreign or remote parts. The difficulty of tracing the witnesses has arisen from the intentional act of the testator, but should not work to the prejudice of his legatees. Now there is a line of cases in Ireland which quite justifies the establishment of a will in the absence of direct evidence and without actual proof of the handwriting of either of

the subscribing witnesses. I do not dwell on them beyond giving the citations: *Clarke v. Clarke*, 3 Ir. R. Ch. 306, affirmed in appeal by a strong Court in 5 Ir. R. Ch. 47; *Re Malins*, 19 L. R. Ir. 231; and *Flood v. Russell*, 29 L. R. Ir. 91. The case which goes furthest in England appears to be *Harris v. Knight*, 15 P. D. 170, where the proposition is laid down as to presumption of proper execution. "The maxim '*Omnia presumuntur, rite esse acta*' is an expression in short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability:" *per* Lindley, L. J.

Judgment.
Boyd, C.

It is objected that the letters dated after the will cannot be used to establish the due execution of the instrument. I understand the cases cited, *Re Ripley* 1 Sw. & T. 68, and *Doe d. Shallcross v. Palmer*, 16 Q. B. 747, which are commented on in *Sugden v. Lord St. Leonards*, 1 P. D. 154, to establish the rule of evidence, that in the case of a last will the statement of a testator that he had duly executed it will not be received as evidence of its due execution, *i. e.*, his mere assertion is not enough to prove the document; something more is needed; but the Court may regard post-testamentary statements in writing of the deceased to assist in coming to a right conclusion. That course was followed by Warren, J., in *Re Malins*, and it is not opposed to *Re Ripley*, for there the document was a mere copy to which no signature of any kind was attached, and the mere assertion of the testator was insufficient. In old phrase these letters of the testator are of administrative assistance, and are not to be rejected *in toto* where the will itself is in evidence with the testator's and witnesses signatures thereon. See *Gould v. Lakes*, 6 P. D. 1. Apart from the post-testamentary letters I should think

Judgment. the circumstances were sufficiently persuasive to warrant
Boyd, C. the granting of probate, but taking the correspondence as a whole, I think that clear proof is well established.

The judgment should, therefore, be affirmed ; but it is not a case for costs against the infant grandchildren.

The other members of the Court concur in this result.

MEREDITH, J. :—

If all the statements made by the deceased respecting the making of the will be rejected, enough evidence remains to support the finding of the Surrogate Court Judge that it was duly executed.

Statute law requires that there shall be attesting witnesses to the making of a will ; but does not require proof of the making of it by them. A stringent rule of evidence, however, required that where there was an attesting witness to a writing, it must be proved by such witness ; statute law, recognizing that rule, has modified it by making it inapplicable to any instrument to the validity of which attestation is not requisite : see now R. S. O., (1887), ch. 61, sec. 50. And there were always exceptions to that stringent rule, one of which, necessarily, was, inability to adduce the evidence of such witness ; the writing was not to fail merely because the party desiring to prove its due execution was unable to do so by the attesting witness, or even though such witness should attempt to disprove it, if there were other sufficient evidence of its due execution.

Recognizing this rule and this exception to it, one of the rules of the Surrogate Court provides that, in non-contentious matters :—

“10. The due execution of the will or codicil shall be proved by one of the witnesses, or the absence accounted for ; in which last case such will or codicil must be established by other proof, to the satisfaction of the Judge.”

In England the practice seems to require proof of the signatures of the attesting witnesses, in the like case, before probate granted in the ordinary course in non-contentious

matters. Under the rules, orders, and instructions to the principal registrar of Her Majesty's Court of Probate : Rules and Orders of 1882, Rule 7: "If both of the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also any circumstances which may raise a presumption in favour of the due execution."

Judgment.
Meredith, J

In this case the will is being proved in solemn form; all parties concerned in the estate are before the Court; the will is altogether in the handwriting of the deceased; on the day on which it purports to have been executed he was in the company of two strangers, and in the evening of that day he told their names to one of the witnesses at the trial, the names being the same as those appearing upon the will as the witnesses to its execution; and the deceased's reasons for choosing such persons, strangers, persons quite unknown in the place where the deceased lived, seems accounted for by the book, which he possessed and seems to have taken for his guide, Wetherfield's Law of Wills, Probate, and Administration, in which the writer recommended "strangers" for witnesses to a will.

In these and the other circumstances of the case there seems to be but one of two states of facts at all possible; either the will is really the will of the testator, executed apparently with a knowledge of the formalities required by law to make it effectual, or else it is a forgery and the strange story of its making a fabrication to support the false document.

But although the proof of the will was vigorously contested on behalf of the next of kin, no evidence whatever was given against the genuineness of the writing or discrediting any of the witnesses who gave evidence in support of it. The case is just such an one as would, if the

Judgment. will were a forgery, have enabled the defence to give some evidence questioning its validity.

Meredith, J.

Having regard to all the facts proved, I am unable to say that the learned Judge erred in giving effect in this case to the presumption in favour of the making of this will in accordance with all the formalities required by law, even if all the evidence of statements made by the deceased were excluded; though I would have been better satisfied if some further and better directed efforts to find out something more about the attesting witnesses had been made and proved: see *Cunliffe v. Sefton*, 2 East 183; *Call v. Dunning*, 4 East 53; *Regina v. St. Giles, Camberwell*, 1 E. & B. 642.

G. F. H.

[DIVISIONAL COURT.]

McVITTIE V. O'BRIEN.

Parliamentary Elections—Ontario Voters Lists Act, 1889—Notice of Action—Action for Penalties—Officer—52 Vict. ch. 3—R. S. O. ch. 73.

A clerk of a municipality is not an officer within the meaning of R. S. O. ch. 73, in respect to the performance in that capacity of the duties prescribed by the Ontario Voters Lists Act, 1889, 52 Vict. ch. 3, and is not entitled in an action for the penalties imposed for default in that regard, to the protection of the above revised statute.

Statement.

THIS was an action by William McVittie against M. O'Brien, who was during the year 1895, clerk of the municipality of the Union Townships of Drury, Denison, and Graham, in the district of Algoma, and who as such had, during that year, to perform the duties required of municipal clerks under the Ontario Voter Lists Act 1889, 52 Vict. ch. 3, for penalties as provided by sections 35 and 36 of that Act, for neglect of such duties in posting up, the transmission, etc., of the lists, as are prescribed by sections 5, 6, 7, 9, 13.

By his statement of defence, the defendant denied the

alleged defaults in duty, and by paragraph 9 pleaded that Statement.
"if the acts and omissions complained of were the acts or omissions of the defendant, which he did not admit but denied, said acts or omissions were those of the defendant acting under and by virtue of the Ontario Voter Lists Act 1889, and in pursuance thereof, and in the intended execution of his duties as clerk of the municipality of the Union Townships of Drury, Denison, and Graham, in the district of Algoma, and that the said defendant acted in the premises with reasonable and probable cause, and without malice."

The Master in Chambers, on May 12th, 1896, on motion made, struck out this paragraph of the defence, and on appeal to FALCONBRIDGE, J., and, on leave being asked to plead the provisions of sec. 1 of R. S. O. ch. 73, the Act to protect Justices of the Peace and others from Vexatious Actions, the learned Judge on May 26th, 1896, dismissed the appeal, and refused the leave asked on the authority of *Walton v. Apjohn*, 5 O. R. 65.

The defendant appealed to the Divisional Court, and asked leave to set up the provisions of R. S. O. ch. 73, so far as the same were applicable to this action.

The appeal was argued on June 15th, 1896, before MEREDITH, C. J., and ROSE, J.

Watson, Q. C., for the defendant. The question is, is the defendant an officer within R. S. O. ch 73? We contend that he is: *Spry v. Mumby*, 11 C. P. 285; *McDougall v. Peterson*, 40 U. C. R. 95; *Johnson v. Allen*, 26 O. R. 550.

[ROSE, J., referred to *McLeish v. Howard*, 3 A. R. 503.]

The clerk of a municipality stands on as high a footing as a pathmaster and other officials who have been found entitled to notice of action. We refer also to *Stratford Gas Co. v. Gordon*, 14 P. R. 407.

W. H. P. Clement, for the plaintiff, relied on *Walton v. Apjohn*, 5 O. R. 65.

Judgment. MEREDITH, C. J. (at the close of the argument) :—

Meredith,
C.J.

All that was necessary to render the defendant liable is contained within the four corners of the sections 35 and 36 of 52 Vict. ch. 3 (O.).

By sec. 35 the penalty is imposed for the omission, neglect, or refusal to do any of the acts mentioned in it, and by section 36 the penalty is incurred in the case of a wilful act or omission of the character indicated in that section.

The defendant seeks to make the issue whether he in doing what is complained of acted maliciously and without reasonable and probable cause.

It is sufficient to say that in creating the offence dealt with by section 35 the legislature has not thought fit to make malice and the absence of reasonable and probable cause a necessary ingredient, and if under section 36 the word "wilfully" introduces that element, as to which I express no opinion, it is put in issue by the denial of the plaintiff's allegation, which is that the acts and omissions charged were wilful.

Section 1 of R. S. O. ch. 73, can have no application to the acts complained of, because to sections 35 and 36 of 52 Vict. ch. 3 (O.), alone must reference be had for what is necessary to constitute the offences which those sections create.

The appeal must be dismissed.

ROSE, J., concurred.

A. H. F. L.

END OF VOL. XXVII.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACCELERATION.

Of Remainder—Will—Widow—Election.]—See WILL, 6.

ACCIDENT.

Private Approach to Open Highway—Liability of Private Person.]—See MUNICIPAL CORPORATIONS, 1.

Railways—Moving Train—Postal Car—Bare Licensee.]—See RAILWAYS, 1.

AGREEMENT.

Offer to Purchase—Withdrawal—Sale of Land.]—See CONTRACT.

Will—Advance to Wife—Charge on Her Estate—Covenant of Husband and Wife.]—See PRINCIPAL AND SURETY, 2.

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ALIMONY.

1. *Judgment Therefor—Default in Payment—Subsequent Judgment for Arrears in County Court—Effect of.*]—Where, after the recovery and registration of judgment in an alimony action directing payment to the wife of a yearly sum in quarterly instalments, she, on default being made in payment of two of the instalments, brought an action therefor in the County Court, and recovered judgment, she was, notwithstanding, held entitled to the usual order for the sale of the husband's lands for the realization of the alimony.

Semble, that the judgment recovered in the County Court was a nullity. *Lee v. Lee*, 193.

2. *Cruelty—Condonation of—Subsequent Misconduct.*]—The condonation by a wife of acts of cruelty and ill-treatment by the husband

which would justify her leaving him and claiming alimony, is conditional on the non-recurrence of such misconduct, and is removed by subsequent ill-treatment and threats after such condonation.

Legal cruelty considered and defined.

Decision of MEREDITH, J., at the trial reversed. *Bavin v. Bavin*, 571.

APPEAL.

Divisional Court—Discovery of New Evidence—Motion for New Trial—County Court Judgment—Law Courts Act, 1895, sec. 44, sub-sec. 3.—A Divisional Court has no jurisdiction under section 44, subsection 3 of the Law Courts Act, 1895, to hear an appeal from a County Court in term refusing a new trial on the ground of the discovery of fresh evidence, and this applies to a judgment given before the Act came into force. *Brown v. Carpenter*, 412.

ASSESSMENT AND TAXES.

Municipal Elections—Disqualification—Exemption—56 Vict. ch. 35, sec. 4 (O.).—See MUNICIPAL CORPORATIONS, 6.

Succession Duty—Present and Future Interests.—See REVENUE.

ASSIGNMENT.

Of Non-negotiable Chose in Action Without Notice—Equities.—See CHOSE IN ACTION, 1.

ASSIGNMENTS AND PREFERENCES

Purchase of Debt before Assignment—Knowledge of Insolvency—Right of Set-off.—Before an assignment for the benefit of his creditors, a person indebted to the assignor, and who was aware of his insolvency, purchased from a creditor of the insolvent a debt due to the former by the latter, which the purchaser claimed to set-off against his debt to the insolvent:—

Held, that under R. S. O. ch. 124, sec. 23, in connection with the general law of set-off, he was entitled to do so. *Thibaudeau v. Garland*, 391.

Landlord's Preferential Lien.—See LANDLORD AND TENANT, 7.

ATTACHMENT.

Division Courts—"Cause"—"Action"—Forum for Garnishee Proceedings—R. S. O. ch. 51, secs. 87, 185.—See DIVISION COURTS, 3.

Rent—Apportionment of—Suspension of Right of Distress.—See LANDLORD AND TENANT, 1.

ATTORNEY.

For Sale of Land—Authority to Pay Advance—Personal Obligation.—See EQUITABLE ASSIGNMENT.

ATTORNEY-GENERAL.

Parties—Action by Gas Consumer—50 Vict. ch. 85 (O.).—See TORONTO GAS COMPANY.

BANKS AND BANKING.

Bank Act—53 Vict. ch. 31, secs. 74-75—Security Form C—"Negotiation"—Invalidity—Assignee for Creditors.—A bill or note taken by a bank on acquiring a security in form C to the "Bank Act," 53 Vict. ch. 31, secs. 74-75 (D.), is not "negotiated" at the time of the acquisition thereof within the meaning of the latter section, when the person giving the security and to whose account the proceeds of the bill or note are credited, is not at liberty to draw against them except on fulfilling certain other conditions; and such security not being registered is void under the Chattel Mortgage Act against the assignee for creditors under R. S. O. ch. 124. *Halsted v. The Bank of Hamilton*, 435.

person so signing was that of surety, and that the validity of the note was not affected by the manner in which it was signed.

Per MEREDITH, J.—He was liable as maker of a new note.

At the trial in a Division Court two of the defendants did not press their defence, and judgment was given against them, although not formally entered until judgment which was reserved against the other defendant was subsequently given against him. Afterwards, the two defendants moved for a dismissal of the action, which was refused on the ground that judgment having been given against them at the trial they were too late:—

Held, that they could not appeal to the Divisional Court against the judgment. *Kinnard v. Tewsley*, 398.

BENEFIT SOCIETY.

Policy—Voluntary Settlement—Insolvency.—*See INSURANCE*, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Discount—Signature by Holder under Maker's Name—Right to Recover—Division Court—Postponement of Formal Judgment—Non-suit—Appeal.—Where a promissory note commencing "I promise to pay," and signed by two makers, was afterwards discounted by the plaintiff for the holder thereof, the money being paid to him on his agreeing to become responsible for the payment of the note, he signing his name under those of the makers:—

Held, *per* BOYD, C., and FERGUSON, J., that the liability of the

BILLS OF EXCHANGE ACT.

Presumption of Value—Section 30.—*See EXECUTORS AND ADMINISTRATORS*, 1.

BILLS OF SALE.

1. *Fraud—Possession—Onus.*—The due registration of a bill of sale prevents the inference of fraud being drawn from the retention of possession of the goods by the bargainor.

Cookson v. Swire, 9 App. Cas., at pp. 664-5, specially referred to.

Judgment of the County Court of Prescott and Russell reversed. *Belanger v. Menard*, 209.

2. *Insurance Pursuant to Covenant—Assignment of Mortgage—Equitable Assignee of Insurance Money—Application of Payments.*—Promissory notes for the purchase

money of goods were secured by a chattel mortgage given on behalf of the purchasers containing a covenant to insure for the benefit of the mortgagee, who discounted the notes with the plaintiffs and assigned the chattel mortgage but did not transfer the insurance to them, the loss under which was payable to himself. The policy was afterwards renewed by the purchasers' firm, but it did not appear that the renewal was assigned to the mortgagee, or the loss made payable to him. Subsequently a fire occurred and the purchasers' firm assigned the insurance money to the plaintiffs, with whom they kept an account, as security for their general indebtedness, and the plaintiffs received and applied it on the notes above mentioned, but afterwards sought to apply it in payment of other indebtedness of the purchasers:—

Held, that the plaintiffs were bound to apply the insurance money, for the benefit of the mortgagee, who was the equitable assignee of the policy under which the money was paid, and entitled to have it applied in payment of the notes to pay which as between him and the purchasers it was primarily applicable, and the plaintiffs took the money subject to the equitable rights of the mortgagee of which they had notice. *Western Bank v. Courtemanche*, 213.

3. *After Acquired Goods — Description — Schedules — Change of Place of Business.*—Where persons carrying on business as manufacturers of hoops and staves at their factory at B., and also as general storekeepers at L., in the same county, made a chattel mortgage conveying their goods and chattels to defendant, as set forth in two

schedules annexed thereto, schedule A. covering the machinery and other goods and chattels in the factory, and which, after describing them, extended to all other goods and chattels thereafter purchased or manufactured or brought on the premises, whether for the business of stove manufacturing or not, or into or upon any other premises thereafter to be occupied by the mortgagors, or either of them, it being understood that all logs, staves and bolts manufactured and timber brought on the mortgagor's premises or not, after the execution of the mortgage, should be covered thereby; the other schedule B. covering the goods and chattels in the general store, and extending to goods and chattels thereafter brought into the said store premises:—

Held, that the provision in schedule B. as to after acquired goods referred only to goods brought into the store in which the business was then being carried on, and not to goods brought into the store at B., to which that business had been subsequently removed; and that the provision as to after acquired goods in schedule A. did not apply to the after acquired goods brought into the store at B., for the reference thereto was only to goods of the character referred to in that schedule. *Milligan v. Sutherland*, 235.

4. *Chattel Mortgage—Affidavit of Bona Fides—Money not Actually Advanced at the Time—Invalidity of Mortgage.*—A chattel mortgage to secure a present advance of money, regular in every other respect, was duly executed and filed in the proper office, but the consideration money was not actually paid over until four days after the filing, nor was there any binding agreement at the time

of the execution and filing between the parties that the money should be advanced :—

Held, that the mortgage was invalid. *Martin v. Sampson*, 545.

BY-LAW.

Municipal Corporations—County By-law—Guaranteeing Debentures—Form of By-law—Time of Passing—Liability.—See MUNICIPAL CORPORATIONS, 7.

Municipal Corporations—Ultra Vires By-law—Petty Chapmen—Liability.—See MUNICIPAL CORPORATIONS, 9.

CASES.

Agra and Masterman's Bank, In re, L. R. 2 Ch. at p. 397, specially referred to.]—See CHOSE IN ACTION, 1.

Ancaster, Corporation of v. Durand, 32 C. P. 563, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

Ashley's Case, 6 Co. 320, followed.]—See JUSTICE OF THE PEACE, 1.

Ashley v. Brown, 17 A. R. 500, followed.]—See FRAUDULENT CONVEYANCE.

Ballagh v. The Royal Mutual Fire Ins. Co., 5 A. R. 87, specially referred to.]—See INSURANCE, 1.

Bell v. Walker, 20 Gr. 558, followed.]—See LIMITATION OF ACTIONS, 3.

Bingham v. Bingham, 1 Ves. Sen. 126, applied.]—See WILL, 5.

Cameron v. Cusack, 17 A. R. 489, followed.]—See FRAUDULENT CONVEYANCE.

Chadock v. Cowley, 3 Cro. Jac. 695, distinguished.]—See WILL, 10.

Coatsworth v. Carson, 24 O. R. 185, followed.]—See WILL, 2.

Connell v. Town of Prescott, 22 S. C. R., at pp. 162-3, referred to.]—See MUNICIPAL CORPORATIONS, 2.

Cookson v. Swire, 9 App. Cas., at pp. 664-5, specially referred to.]—See BILLS OF SALE, 1.

Darling v. McLean, 20 U. C. R. 372, followed.]—See PRINCIPAL AND SURETY, 1.

Derochie v. Town of Cornwall, 21 A. R. 279, followed.]—See MUNICIPAL CORPORATIONS, 2.

Embler v. Town of Wallkill, 57 Hun 384, specially referred to.]—See MUNICIPAL CORPORATIONS, 2.

Finlay v. The Bristol and Exeter R. W. Co., 7 Exch. 409, considered.]—See MASTER AND SERVANT, 2.

Foster, In re, Lloyd v. Carr, 45 Ch. D. 629, followed.]—See TRUSTS.

Gordon v. Martin, Fitz. G. 302, distinguished.]—See PRINCIPAL AND SURETY, 1.

Greenwood v. Verdon, 1 K. & J. 74, followed.]—See WILL, 10.

Grey v. Ball, 23 Gr. 390, followed.]—See LIMITATION OF ACTIONS, 3.

Guild & Co. v. Conrad, [1894] 2 Q. B. 885, distinguished.]—See GUARANTEE—PRINCIPAL AND SURETY, 1.

Hobson v. Shannon, 26 O. R. 554, specially referred to.]—See DIVISION COURTS, 3.

Imperial Fire Ins. Co. v. Bull, 18 S. C. R. 697, followed.]—See INSURANCE, 1.

Ladyman v. Grave, L. R. 6 Ch. 763 (dictum of Hatherley, L. C.), not followed.]—See WAY, 2.

Lee v. Gilmour, *Reg. ex rel.*, 8 P. R. 514, distinguished.]—See MUNICIPAL CORPORATIONS, 6.

Little v. Billings, 27 Gr., at p. 357, commented on.]—See WILL, 10.

Lloyd v. Carr, *In re Foster*, 45 Ch. D. 629, followed.]—See TRUSTS.

McCullough v. Anderson, [December 5th, 1895, reported in footnote.]—See *Ferguson v. Township of Southwold*, at p. 73.

McLean v. McLeod, *Re*, 5 P. R. 467, followed and specially referred to.]—See DIVISION COURTS, 2, 3.

Michell v. Brown, 1 Ell. & Ell., at p. 275, followed.]—See MUNICIPAL ELECTIONS.

Reddick v. The Saugeen Mutual Fire Ins. Co., 14 O. R. 506, followed.]—See INSURANCE, 1.

Regina v. Budway, 8 C. L. T. Occ. N. 269, followed.]—See SUNDAY.

Regina v. Coulson, 24 O. R. 246, not followed.]—See JUSTICE OF THE PEACE, 2. Distinguished.]—See MEDICAL PRACTITIONER.

Regina v. Daggett, 1 O. R. 537, followed.]—See SUNDAY.

Regina v. Howarth, 24 O. R. 561, followed.]—See MEDICAL PRACTITIONER.

Regina ex rel. Lee v. Gilmour, 8 P. R. 514, distinguished.]—See MUNICIPAL CORPORATIONS, 6.

Regina v. Somers, 24 O. R. 244, followed.]—See SUNDAY.

Regina v. Tinning, 11 U. C. R. 636, not followed.]—See SUNDAY.

Robinson v. Emerson, 4 H. & C. 352, followed.]—See MUNICIPAL ELECTIONS.

Roe d. Sheers v. Jeffery, 7 T. R. 589, followed.]—See WILL, 10.

Sandiman v. Breach, 7 B. & C. 96, followed.]—See SUNDAY.

Sheers v. Jeffery, *Roe d.*, 7 T. R. 589, followed.]—See WILL, 10.

Smith v. City of London Ins. Co., 14 A. R. 328, specially referred to.]—See INSURANCE, 1.

Tipling v. Cole, *Re*, 21 O. R. 276, specially referred to, and distinguished.]—See DIVISION COURTS, 2, 3.

Trustees of School Section No. 6, York v. Corporation of York, 26 O. R., at p. 664, reversed.]—See PUBLIC SCHOOLS.

Warren v. Murray, [1894] 2 Q. B. 648, principle of applied.]—See LIMITATION OF ACTIONS, 3.

CERTIORARI.

Notice to Magistrate—Contempt.]—See CONTEMPT OF COURT.

Practising Medicine—Ontario Medical Act, *R. S. O. ch. 148, sec. 45.*]—See MEDICAL PRACTITIONER.

CHARITABLE DEVISE.

Gift for School Teacher's Residence—Invalidity—9 Geo. II. ch. 36.]—See WILL, 3.

CHATTEL MORTGAGE.

See **BILLS OF SALE.**

CHOSE IN ACTION.

1. *Absolute Assignment*—*Secret Defeasance*—*Subsequent Assignment for Value without Notice*—*Equities*.]

—Where a non-negotiable chose in action is absolutely transferred by writing for value, and the transferee again absolutely assigns it for valuable consideration to another person, who takes without notice, he obtains a valid title to it, free from any latent equity between the original assignor and assignee.

In re Agra and Masterman's Bank, L. R. 2 Ch., at p. 397, specially referred to. *Quebec Bank v. Taggart*, 162.

2. *Parol Assignment of*—*R. S. O. ch. 122, sec. 7.*—A parol assignment of book debts is valid under the Mercantile Amendment Act, R. S. O. ch. 122, sec. 7, and does not require the assent of the debtor. *The Trusts Corporation of Ontario v. Rider*, 593.

3. *Assignment of*—*Set-off.*—By an agreement for the dissolution of a firm, it was provided that all claims and demands, notes, bills and book accounts belonging to the firm were to be collected by the plaintiffs, who were to be the owners thereof, and by virtue of which the plaintiffs sued defendant for a balance alleged to be due for goods sold and delivered by the firm to defendant, who set up a claim for damages for non-delivery of goods by the firm which arose before the dissolution of the partnership:—

Held, a valid assignment of a

debt due by defendant to the plaintiffs; and that the defendants could set-off the claim for damages arising by reason of a breach of the agreement under which the debt arose.

The difference between the Imperial and Ontario Choses in Action Act referred to. *Seyfang v. Mann*, 631.

COMPANY.

1. *Auditor*—*Right to Rank as "Clerk"*—*Winding-up Act.*—An auditor employed in auditing books of a company does not come within the designation of "clerks and other persons having been in the employment of the company in or about its business or trade" so as to entitle him to the special privilege given by sec. 56 of the Winding-up Act, R. S. C. ch. 129, to be collocated in the dividend sheet for arrears of salary or wages. —*Re Ontario Forge and Bolt Co.*; *Re Winding-up Act*, R. S. C. ch. 129; *Townsend's Case*, 230.

2. *Promoters*—*Liability for Debts Incurred before Incorporation*—*Contribution.*—A proposed corporator in a joint stock company, who, in advance of the incorporation takes a practical part in the prosecution of the intended business of the company, or who sanctions or ratifies the conduct of affairs by some act, not being a mere subscription to shares, is liable to contribute, with other subscribers to stock in a like position, to a liability properly incurred in carrying out the objects of the projected company, and the proportionate amount of contribution by each depends on his share subscription irrespective of the amount paid on the shares. —*Sandusky Cowl Co. v. Walker*, 677.

3. *New Stock—By-law for Allotment by Shareholders—Right of Directors to Allot—Directors—Duration of Office—By-law—Right of Shareholders to Vary at Special General Meeting—R. S. O. ch. 157, sec. 37.*—Where a by-law is passed at the annual general meeting of a joint stock company providing for the allotment of certain new stock by the shareholders, the directors have no power to pass a by-law directing its repeal and providing for the allotment by themselves.

At a meeting of the directors of a company a by-law, under section 37 of R. S. O. ch. 157, was passed, and subsequently confirmed by the shareholders, providing that the directors should hold office for one year and until their successors were appointed:—

Held, that the by-law so passed could only be repealed at the next annual general meeting of the company, and therefore a by-law passed during the directors' year of office, by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid. *Stephenson v. Vokes*, 691.

Implied Contract—Contract of Hiring.—See MASTER AND SERVANT, 2.

Scire Facias—Winding-up Act—R. S. O. ch. 129—Action against Contributory—Bar to Action.—See SCIRE FACIAS.

COMPOUNDING FELONY.

Mortgage—Mitigation of Sentence.—See MORTGAGE, 1.

CONDITIONAL SALE OF GOODS.

Distress—Vendor's Lien—Surplusage—57 Vict. ch. 43.—See LANDLORD AND TENANT, 6.

CONSOLIDATED MUNICIPAL ACT, 1892.

Sections 167 and 210—Penalties—Prior and Subsequent Enactments as to Same Offence—Repugnancy.—See MUNICIPAL ELECTIONS.

Section 419 (a)—Police Magistrate—Disqualification.—See POLICE MAGISTRATE.

Section 511, sub-sec. 2—By-law—Guaranteeing Debentures—Assent of Electors.—See MUNICIPAL CORPORATIONS, 7.

Section 533a—Cost of Bridges—Appeal—Arbitration Pending—57 Vict. ch. 50 (O.).—See STATUTES.

CONSTITUTIONAL LAW.

Railways—Crossings—Railway Act of Canada, 1888—Powers of Railway Committee of Privy Council—Erection and Maintenance of Gates—Contribution to Cost of—Municipal Corporations.—The legislation of the Parliament of Canada with reference to the guarding of the crossings of a railway, which under sub-section 10 of section 92 of the British North America Act is under the exclusive legislative authority of Parliament, is within the scope of necessary legislation.

Under sections 11, 18, 21, 187, and 188 of the Railway Act of 1888, Parliament conferred upon the Rail-

way Committee the power to order that gates and watchmen should be provided and maintained by such a railway at crossings of highways traversing different adjacent municipalities; to decide which municipalities are interested in the crossings; to fix the proportion of the cost to be borne by the different municipalities; to vary any order made by adding other municipalities as interested, and to re-adjust the proportion of the cost; and the decision of the committee cannot be reviewed by the Court.

Municipalities are subject to such legislation and the orders of the committee in the same way as private individuals. *Re Canadian Pacific R. W. Co. and County and Township of York*, 559.

CONSUMERS GAS COMPANY.

Reserve Fund — Plant Renewal Fund — Investment of Surplus — Reduction in Price of Gas — Parties — Attorney-General.]—See **TORONTO GAS COMPANY.**

CONTEMPT OF COURT.

Certiorari — Notice to Magistrate.]—After the issue of a writ of *certiorari* for the removal of a conviction for the purpose of quashing it, the writ, though served on the clerk of the peace, did not come to the notice or knowledge of magistrate, who enforced the conviction by the issue of a distress warrant:—

Held, that the magistrate was not guilty of contempt. *Regina v. Woodyatt*, 113.

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CONTRACT.

Sale of Land — Offer to Purchase — Withdrawal.]—A parcel of land having been placed by the plaintiff in a land agent's hands for sale, the defendant offered to purchase it, and signed a form of agreement for sale and purchase, which was taken by the agent to the plaintiff and was signed by him, but before the defendant was notified thereof he gave notice to the agent withdrawing his offer:—

Held, that the instrument, though in form an agreement, was in substance a mere offer, and as defendant had withdrawn before he was notified of its acceptance, there was no completed agreement. *Larkin v. Gardiner*, 125.

General Hiring — Hiring for a Year — Question of Fact — Corporations.]—See **MASTER AND SERVANT**, 2.

Married Woman — Separate Estate — Personal Articles.]—See **HUSBAND AND WIFE**, 2.

CONTRIBUTORY NEGLIGENCE.

Highway — Overgrowing Tree — Want of Repair.]—See **MUNICIPAL CORPORATIONS**, 2.

CONVEYANCE.

Delivery — Operation.]—See **WILL**, 2.

CONVEYANCE OF ROAD.

Deed — Right of Way.]—See **WAY**, 1.

CONVICTION.

Permitting Deer Hound to Run at Large—Scienter—Ontario Game Protection Act, sec. 2, sub-sec. 2.]—See GAME.

Practising Medicine—Ontario Medical Act, R. S. O. ch. 148, sec. 45.]—See MEDICAL PRACTITIONER.

COPYRIGHT.

Compilation—Proprietor—Residence in England—Copyright Through Agent—Stereotyping—Infringement.]—A person, resident in England, who procures a book for valuable consideration, to be compiled for him, the compiler not reserving his rights, is the proprietor thereof, and entitled, either personally or through an agent in Canada, to copyright under the Copyright Act, R. S. C. ch. 62.

Printing and publishing the book from stereotype plates imported into Canada is a sufficient "printing" within the meaning of the Act, though no typographical work is done in preparation of the copies.

American reprints of the plaintiff's copyright book added as an appendix to American reprints of the Bible imported into Canada, were held to be a violation of the plaintiff's rights. *Frowde v. Parrish*, 526.

CORPORATIONS.

See COMPANY.

COVENANT.

Unexecuted Deed—Acceptance of Benefit under Deed—Action.]—An action of covenant cannot be main-

tained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay certain mortgages existing upon the premises but which has not been executed by the grantee, although she has accepted the benefit of the deed. The Credit Foncier Franco-Canadian v. Lawrie, 498.

CREDITORS' RELIEF ACT.

Division Court Execution—Return of Nulla Bona—Execution to Sheriff—57 Vict. ch. 23 (O.)—Prohibition.]—On the return of nulla bona to a Division Court execution, the plaintiff, under 57 Vict. ch. 23 (O.), amending the Division Courts Act, issued out of said Division Court an execution against lands to the sheriff of another county, but before the sheriff had taken any steps to enforce it, the defendant paid to him the amount thereof, with the request that it should be applied on plaintiff's execution. At the time of such payment there were other executions in the hands of the sheriff against the goods and lands of the defendant:—

Held, reversing the judgment of the County Court Judge, that the Creditors' Relief Act applied to the moneys so received by the sheriff. *In re Young v. Ward*, 588.

CRIMINAL CODE.

Amending Conviction—Scienter—Deer Hound Running at Large—Sec. 889.]—See GAME.

Gaming—Betting-house—Telegraph Office—Secs. 197 and 198.]—See GAMING.

Murder — Manslaughter — Misdirection—Secs. 229, 744.]—See CRIMINAL LAW.

CRIMINAL LAW.

Murder — Manslaughter — Criminal Code, sec. 229—Provocation—Assault—Legal Right—New Trial.]—The prisoner was tried upon an indictment of murder. It was not denied that he had killed the deceased, but it was urged that, by sec. 229 of the Criminal Code, the offence was reduced to manslaughter, as having been committed "in the heat of passion caused by sudden provocation." There was evidence that just before the killing the prisoner had called at the house of the deceased to see the latter, who ordered him out and immediately laid hands on him and put him out of the house, when the prisoner drew a revolver and shot deceased. The Judge at the trial directed the jury that deceased was, at the time he was killed, "doing that which he had a legal right to do," and that there was, therefore, no provocation and no question of fact to be submitted to the jury to reduce the crime to manslaughter:—

Held, misdirection; for whether or not the deceased, at the time he was shot, was doing what he had a legal right to do depended upon whether, if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting, the deceased had, before laying hands upon him, ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether, if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal

right to do if the facts were found in favour of the prisoner's contention on these points.

New trial directed, upon an appeal under sec. 744 of the Criminal Code. *Regina v. Brennan*, 659.

Compounding Felony—Mortgage—Larceny—Validity.]—See MORTGAGE, 1.

Procedure—Issue of Warrant—Absence of Written Information—Liability of Magistrate.]—See JUSTICE OF THE PEACE, 1.

Uncertificated Druggist.]—See PHARMACY ACT.

CROWN LANDS.

Locatee — Partition — Jurisdiction—Declaratory Relief—Statute of Limitations—Judicature Act—R. S. O. ch. 44, sec. 21, sub-sec. 7.]—A locatee of Crown lands left the Province in 1868, and was last heard of in 1877. The defendant, a son of his, had resided continuously on the property since 1881, cultivating and improving it, and the plaintiff, a daughter, resided on it also, from time to time, till 1887. There were two other children who had not been in possession of the land for more than ten years before action, which was brought in 1895:—

Held, that the locatee must be presumed to have been dead by 1884, and the defendant had acquired a title by possession as against the children other than the plaintiff, whose claim as to one-quarter was as good as his, and in making partition the Crown should recognize his right to the improvements.

The Statute of Limitations, R. S. O. ch. 111, applied because the rights

involved upon the record were merely private rights not affecting the pleasure or the sovereignty of the Crown.

Even in the case of unpatented lands, declaratory relief may in a suitable case be given, which will work practically the result of a partition of the property, subject to the Crown being willing to act upon the judgment of the Court. *Pride v. Rodger*, 320.

DECLARATORY RELIEF.

Locatee—Partition—Jurisdiction
—*R. S. O. ch. 44, sec. 21, sub-sec. 7.*
—*See CROWN LANDS.*

DEED.

Acceptance of Benefit Under —
Covenant.]—*See COVENANT.*

Delivery—Operation.]—*See WILL,*
2.

DEFAMATION.

Libel — Newspaper — Notice of
Action—Sufficiency—R. S. O. ch. 57,
sec. 5.]—In an action brought against a newspaper company for alleged libellous articles published in the company's newspaper, the notice complaining of the publication given in pursuance of *R. S. O. ch. 57, sec. 5, sub-sec. 2*, was addressed to the editor of the paper, and was served on the city editor at the company's office, and a similar notice was served on the chairman of the board of directors at the said office:—

Held, that this was a notice merely to the editor, and not to the defendants, and therefore was not suffi-

cient under the statute. *Burwell v. The London Free Press Printing Co.*, 6.

DEVISE.

See WILL.

DIRECTORS.

By-law Governing Appointment of
—Powers to Repeal—Annual Meet-
ing of Shareholders.]—*See COMPANY,*
3.

DISTRESS.

Apportionment of Rent on Garnish-
ment.]—*See LANDLORD AND TENANT,*
1.

Mortgaged Goods — Agreement be-
tween Bailiff and Tenant—Pound
Breach—2 Wm. & M. sess. 1, ch. 5.
—*See LANDLORD AND TENANT, 5.*

Withdrawal of—Second Distress
—Landlord and Tenant—58 Vict.
ch. 26 (O.).]—*See LANDLORD AND*
TENANT, 4.

DIVISIONAL COURT.

Jurisdiction of.]—*See APPEAL.*

DIVISION COURTS.

1. *Jurisdiction — Prohibition —*
Promissory Note Payable by Instal-
ments.]—An action for the first in-
stalment due on a promissory note
for \$400, payable in three annual

instalments, is for an amount ascertained by the signature of the defendant, and may be brought in a Division Court before the maturity of the second instalment.

"In three annual instalments" in such a note means equal instalments. Prohibition refused. *In re Babcock v. Ayers*, 47.

2. *Garnishee—New Trial*—*R. S. O. ch. 51, sec. 145.*—The provisions of section 145 of the Division Courts Act as to applying for a new trial within fourteen days do not apply to a garnishee.

Re McLean v. McLeod, 5 P. R. 467, followed.

Re Tipling v. Cole, 21 O. R. 276, distinguished.

Judgment of *Boyd, C.*, 26 O. R. 554, affirmed. *Hobson v. Shannon*, 115.

3. *Garnishee Proceedings—"Cause"—"Action"—Jurisdiction.*—A garnishee summons before judgment in a Division Court may be issued out of the Division in which the garnishee lives or carries on business, notwithstanding that the cause of action does not arise and the primary debtor does not reside or carry on business therein.

A garnishee proceeding under section 185 of the Division Courts Act is an "action" or a "cause" within the meaning of section 87, and may be transferred from a wrong to the proper forum, under the last mentioned section.

Hobson v. Shannon, 26 O. R. 554; *Re McLean v. McLeod*, 5 P. R. 467, and *Re Tipling v. Cole*, 21 O. R. 276, specially referred to. *Re McCabe v. Middleton, The Ancient Order of United Workmen, Garnishees*, 170.

4. *Judgment Debtor—Warrant of Commitment—"Backing"—Arrest Outside of County*—*R. S. O. ch. 51, secs. 242 and 243.*—The proceeding by judgment summons in a Division Court, and its consequences, are of a strictly local character.

A warrant of commitment must be directed to a bailiff of the county and to the gaoler of the county in which the proceedings are taken, and is not effectual beyond the limits of the county within which it issued, nor does the "backing" of the warrant by a magistrate in another county give it any force or validity there.

History of sections 242 and 243 Division Courts Act, *R. S. O. ch. 51. Re Hendry*, 297.

Practice—Postponement of Formal Judgment—Appeal.—See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

DRAINAGE.

By-law—Engineer's Report.—See **MUNICIPAL CORPORATIONS**, 8.

DRUGGIST.

Uncertificated—*R. S. O. ch. 151, sec. 24.*—See **PHARMACY ACT.**

EJECTMENT.

Evidence—Possession—Presumption—27 & 28 *Vict. ch. 29, sec. 1 (C.).*—In an action for the recovery of land, proof of possession is *prima facie* evidence of title, and in the absence of proof of title in another is evidence of seizin in fee; if, however, it be proved that the title

is in another, although the defendant does not claim under or in privity with such other, the plaintiff's action will fail.

Where, in such an action, the plaintiffs claimed to have acquired a title thereto by possession, originally that of a squatter, commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee or those claiming under him :—

Held, under 27 & 28 Vict. ch. 29, sec. 1 (C.), that in order to bar the right of the patentee forty years' possession at least was necessary ; and the action thereof failed as against the defendant in possession though not claiming through or in privity with the patentee. *Donnelly v. Ames*, 271.

ELECTION.

Widow—Relation Back—Period of Accounting.]—See *WILL*, 8.

Will — Widow — Dower.]—See *WILL*, 5.

EQUITABLE ASSIGNMENT.

Attorney for Sale of Lands—Authority to Pay Advance out of Proceeds—Subsequent Advance—Acknowledgment—Notice—Registry Act—Attorney Subsequently Becoming Purchaser—Lien—Personal Obligation.]—The attorney under an irrevocable power from the owner, for the "sale or other disposition" of certain lands, subject to several charges, and who by agreement for value was entitled on the sale thereof, after payment of such charges, to a portion of the surplus, agreed in

writing in the event of a sale to pay out of such surplus a further charge on the lands made by the owners subsequent to the giving of the power. The document creating the further charge was registered on the affidavit of a witness thereto, together with the agreement of the attorney to pay, and a statement by the plaintiff that he had advanced and an acknowledgment by the chargee and transfer by her to the plaintiff of the amount of the subsequent charge, the latter documents being registered without proof. Afterwards the owner of the lands conveyed, for value to himself and others, his equity of redemption to the attorney :—

Held, that any defect in the proof for registration of the documents was cured by section 80 of the Registry Act, R. S. O. ch. 114, and that the attorney was affected with notice of the whole transaction :—

Held, also, that the plaintiff had a lien upon the lands for the amount of his advance and interest, and that the effect of the transaction as to the further charge was to equitably assign to him so much of the proceeds of the intended sale of the lands as was equal to his advance, and that he was entitled to redeem the encumbrances existing at the time of his advance :—

Held, lastly, that the attorney was personally liable for the amount of the further charge, *STREET, J.*, dissenting as to the last point on which the judgment of *BOYD, C.*, was reversed. *Armstrong v. Lye*, 511.

ESTATE.

Will—Devise—Defeasible Fee—"Die Without Issue."]—See *WILL*, 10.

ESTOPPEL.

Tenancy—Character of Possession.]
—See WAY, 2.

Widow—Dower—Legacy — Election.]
—See WILL, 5.

EVIDENCE.

Action for Recovery of Land—Possession—Presumption.]
—See EJECTMENT.

Execution of Will.]
—See WILL, 11.

EXECUTION.

Free Grant Lands—Debt Incurred before Location—Devisee—Sale.]
—An execution against the lands of a patentee under the Free Grants and Homesteads Act, R. S. O. ch. 25, on a judgment obtained for a debt incurred before location of the lands, does not operate as a charge against the lands when sold by his devisee, even after the expiry of twenty years from the date of the location. *Re Beatty and Finlayson*, 642.

Equitable — Receiver — Unliquidated Damages.]
—See RECEIVER.

EXECUTORS AND ADMINISTRATORS.

1. *Payments by — Promissory Notes—Consideration — Gifts — 53 Vict. ch. 33, sec. 30 (D.)—R. S. O. ch. 110, sec. 31.*]
—Upon appeal from the order of a Surrogate Court upon the passing of executors' accounts:—

Held, that payments made by them to the payees of promissory notes

signed by the testator, with notice that such notes were made without consideration and were intended by the testator as gifts to the payees, were not protected either by the *prima facie* presumption of a valuable consideration raised by sec. 30 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), or by the provisions of sec. 31 of R. S. O. ch. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient."

Decision of the Surrogate Court of the county of Elgin reversed upon this point. *Re Williams*, 405.

2. *Distribution Pari Passu—Action by Administratrix to Recover Excess—Locus Standi—R. S. O. ch. 110, sec. 36.*]
—An administratrix, having given the statutory notice for creditors, after expiry of the time therein mentioned, paid money on a claim, and afterwards, new claims being raised against the estate, sought to recover a portion of the money back as on an overpayment:—

Held, that she had no *locus standi* to maintain the action. *Leitch v. Molsons Bank*, 621.

Rent—Leasehold—Apportionment.]
—See TENANT FOR LIFE AND RE-MAINDERMAN.

FIRE INSURANCE.

See INSURANCE, 1.

FRAUD.

Bill of Sale—Registration—Retention of Possession—Inference.]
—See BILLS OF SALE, 1.

FRAUDS, STATUTE OF.

Promise to Answer for Debt of Another—29 Car. 2, ch. 3, sec. 4—*Indemnity.*]—See **GUARANTEE**.

FRAUDULENT CONVEYANCE.

13 Eliz. ch. 5—*Intent to Defeat Action for Tort—Creditor—Preference.*]—Where a conveyance of land was made by the father to a daughter, while an action for slander against the father was pending, of which the daughter was aware, in satisfaction of a *bona fide* pre-existing debt to the extent of the full value of the land:—

Held, that the conveyance being attacked under 13 Eliz. ch. 5, by one who became a creditor by judgment obtained in the action of slander three months after the conveyance, and there being no other creditors, the preferring of one creditor was no ground for setting aside the conveyance as fraudulent and void:—

Cameron v. Cusack, 17 A. R. 489, followed.

A plaintiff suing for a tort is not a creditor within the meaning of the Ontario statutes as to preferences:—

Ashley v. Brown, 17 A. R. 500, followed. *Gurofski v. Harris*, 201.

FRAUDULENT PREFERENCE.

Intent to Defeat Action for Tort—Creditor—13 Eliz. ch. 5.]—See **FRAUDULENT CONVEYANCE**.

FREE GRANT LANDS.

Execution—Debt Incurred before Location.]—See **EXECUTION**.

GAME.

Justice of the Peace—Summary Conviction—Permitting Deer Hounds to Run at Large—56 Vict. (O.) ch. 49, sec. 2, sub-sec. (2)—*Scienter—Evidence—Amendment—Criminal Code, sec. 889—Costs.*]—A summary conviction of the owner of a hound or other dog for permitting "such hound or dog to run at large in any locality where deer are usually found," contrary to the provisions of the Ontario Game Protection Act, is bad unless it states that the dog was "known by the defendant to be accustomed to pursue deer;" and cannot be amended under sec. 889 of the Criminal Code unless the evidence shews knowledge of the owner of such habit of the dog. A statement in a deposition that "dogs were at large on defendant's premises" is not evidence that they were either running or permitted to run at large contrary to the statute.

Costs withheld, as the *bona fides* of the magistrate had been unsuccessfully attacked. *Regina v. Crandall*, 63.

GAMING.

Betting—Place Therefor—Telegraph Office—Conviction—55 & 56 Vict. ch. 29 (*The Code*), secs. 197 and 198.]—A bank, a telegraph office, and another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the United States, which receipts were taken to the telegraph office, where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions

to the person there, for whom the receipts were given to place and who placed bets equivalent to the amounts deposited, on horses running in the races, and on their winning the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the persons making the bets in the United States:—

Held, on the evidence and admissions to the above effect, that the defendant, who kept the telegraph office, was properly convicted of keeping a common betting house under sections 197-198 of the Criminal Code. *Regina v. Osborne*, 185.

GARNISHMENT.

Division Courts—“*Cause*”—“*Action*”—*Forum for Garnishee Proceedings*—*R. S. O. ch. 51, secs. 87, 185.*—*See* DIVISION COURTS, 3.

Rent—*Apportionment*—*R. S. O. ch. 143, secs. 2-6.*—*See* LANDLORD AND TENANT, 1.

GUARANTEE.

Indemnity—*Surety*—*Oral Promise*—*Promise to Answer for Debt of Another*—*Statute of Frauds* (29 *Car. 2, ch. 3*), *sec. 4.*—A promise made by a third person to a creditor to pay or to see paid the debt due to him by his debtor, whether such promise is absolute or conditional, is a promise to answer for the debt of another, and is within the 4th section of the Statute of Frauds.

The plaintiff was the holder of a promissory note of an incorporated company of which the defendant was president, and was pressing for pay-

ment when the defendant verbally promised to see him paid if he would forbear to sue and would renew:—

Held, that this was not a promise of indemnity, but of guarantee, and therefore required by section 4 of the Statute of Frauds to be in writing.

Guild & Co. v. Conrad, [1894] 2 Q. B. 885, distinguished.

Judgment of FALCONBRIDGE, J., at the trial reversed. *Beattie v. Dinnick*, 285.

See MUNICIPAL CORPORATIONS, 7.

HIGHWAYS.

By-laws Transferring and Assuming Roads—Invalidity—Relinquishment by Minister of Public Works.]—*See* MUNICIPAL CORPORATIONS, 4.

Want of Repair—Over-growing Tree—Negligence.]—*See* MUNICIPAL CORPORATIONS, 2.

HUSBAND AND WIFE.

1. *Desertion of Wife—Separate Property—Board and Lodging—“Employment or Occupation”*—*R. S. O. ch. 132, sec. 5.*]—A married woman, deserted by her husband is entitled, as her separate estate, without any order for protection, to moneys earned by her by letting lodgings in a house furnished by her husband and by supplying board and other necessities to the lodger, and can recover the same in an action in her own name as moneys acquired by her in an employment and occupation in which her husband has no proprietary interest under the 5th section of the Married Woman's Property Act, *R. S. O. ch. 132.*

BOYD, C., dissenting as regards the claim for board and lodging. *Young v. Ward*, 423.

2. *Contract—Separate Estate—Personal Articles.*]—Where, at the time of a contract being entered into by a married woman, the only property possessed by her consisted of her engagement and wedding rings, a silver watch and chain and her clothing :—

Held, that this was not separate estate with respect to which she could be reasonably deemed to have contracted. *Abraham v. Hacking*, 431.

Alimony—Judgment for—Subsequent Judgment for Arrears in County Court—Effect of.]—See ALIMONY, 1.

Alimony—Cruelty—Condonation.]—See ALIMONY, 2.

INDEMNITY.

Promise to Answer for Debt of Another—Statute of Frauds.]—See GUARANTEE.

INJUNCTION.

Municipal Corporation—Expenditure of Public Money—Contribution to Costs of Private Action.]—See MUNICIPAL CORPORATIONS, 5.

Trade Name—Geographical Designation—"Canadian Bookseller."]—See TRADE NAME.

INSOLVENCY.

Insurance—Benefit Society—Beneficiaries.]—See INSURANCE, 3.

INSURANCE.

1. *Fire Insurance—Statutory Conditions—Variation—Unreasonableness—Notice—Vacancy—Materiality—Part Affected—Title—Agreement between Mortgagee and Insurance Company—Subrogation.*]—The defendants insured seven houses belonging to the plaintiff and which had been mortgaged by him to a loan company and which were described in the policy as "a two-story frame, roughcast, felt-roofed block, * * containing seven dwellings, six of which are occupied by tenants, and one by assured." In the application, filled up by defendants' agent, the question, as to how many tenants, was answered "six tenants and applicant," the agent informing defendants that "the largest house of the lot the applicant will occupy himself." A variation of the statutory conditions was printed on the policy in these words: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied, * * this policy shall cease and be void unless the company shall by endorsement * * allow the insurance to be continued." A fire occurred by which the houses were destroyed, and defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to which they claimed to have a defence against the mortgagor, to be subrogated to the loan company's rights and to

have the mortgage assigned to them. For some months prior to the fire several of the houses became and remained vacant, of which the plaintiff was aware, but of which he did not notify defendants. In an action by plaintiff upon the policy:—

Held, that the actual facts as to occupancy being before them at the time of the application, the defendants were liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant or unoccupied houses:—

Held, also, that the variation as to the premises becoming vacant or unoccupied where, as here, the houses were of a class likely to be occupied by tenants for short periods was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued.

Smith v. The City of London Ins. Co., 14 A. R. 328, and *Ballagh v. The Royal Mutual Fire Ins. Co.*, 5 A. R. 87, specially referred to:—

Held, however, that the fact that several of the houses were vacant to plaintiff's knowledge for some months before the fire, was, under the third statutory condition, a change material to the risk, which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected," which in this case was the whole block:—

Held, also, that the meaning of the word "risk" in the third statutory condition is not distinguishable from the same word in the first statutory condition, and that subsequent mortgages executed by plaintiff were matters relating to title, and were not covered.

Reddick v. The Saugeen Mutual Fire Ins. Co., 14 O. R. 506, followed:—

Held, lastly, that although defendants had paid the mortgagees and taken an assignment of the mortgage, they could not hold it against the plaintiff.

Imperial Fire Ins. Co. v. Bull, 18 S. C. R. 697, followed.

Judgment of FALCONBRIDGE, J., affirmed. *McKay v. Norwich Union Ins. Co.*, 251.

2. *Life Insurance—Premium—Payment—Promissory Note of Third Person—Discount of Note of Insured.*]—There is nothing to prevent an insurance company from accepting the promissory note of a third person in satisfaction and discharge of a premium; and a condition of a policy providing that if a note be taken for the first premium and shall not be paid when due, the policy shall become null and void, is not applicable to a note so taken, but to one taken for and on account of the premium.

And *semble*, that where the agent of the insurance company discounted notes given by the insured for the premium, and retained the proceeds, sending his (the agent's) own note to the company for the amount of the premium, less his commission, the transaction amounted, when the proceeds of the discount were received, to a payment in cash of the premium. *Fleming v. London and Lancashire Life Ass. Co.*, 477.

3. *Life—Voluntary Settlement—R. S. O. ch. 136.*]—A benefit certificate in a mutual insurance society was expressed to be payable to the insurer's mother, and by contract between him and the society it was agreed that it should not be payable nor could it be transferred to any one else than his mother, wife, children, dependents, father, sister or

brother ; and that if he died without having made any further direction as to payment the money should be paid to the beneficiaries in the above order if living.

The insurer died intestate, unmarried, his father and mother predeceasing him, but two sisters survived who were supported by him and claimed the policy moneys in the character of "dependents" as well as "sisters." His estate, was insolvent and his administrator claimed that the money was assets for the creditors :—

Held, that the insurance amounted in effect to a voluntary settlement on the sisters of the insured, who though not within the protection of R. S. O. ch. 136, were beneficiaries named in the policy, and as it was not shewn that the insured was not in a position to make a voluntary settlement at the time he effected the insurance, or at any time, they were entitled to the money. *In re William Roddick*, 537.

Covenant for, in Mortgage—Assignment of Mortgage—Equitable Assignee of Insurance Money.—See **BILLS OF SALE**, 2.

Will—Variation—Election—R. S. O. ch. 136, sec. 6 (1).—See **WILL**, 1.

INTEREST.

Work and Services—Reference—58 Vict. ch. 12, sec. 118 (O.).—On a reference in an action in which money is claimed for work and services agreed to be paid for at a fixed rate, the referee may under 58 Vict. ch. 12, sec. 118 (O.), allow interest on the amounts claimed from the times they became payable. *McCulloch v. Newlove*, 627.

JUDICATURE ACT.

Declaratory Relief—Locatee—Partition—R. S. O. ch. 44, sec. 21, sub-sec. 7.—See **CROWN LANDS**.

JUSTICE OF THE PEACE.

1. *Felony—Issue of Warrant—Absence of Written Information—Reasonable Suspicion—Notice of Action—Sufficiency of.*—A magistrate acts without jurisdiction, and so renders himself liable in trespass, where, without any written information charging another with a felony, he issues a warrant for his arrest therefor ; and, while a reasonable ground for the belief that such person had committed the felony, might justify the magistrate in arresting such person himself, it does not enable him to issue his warrant for his arrest by another.

Ashley's Case, 6 Co. 320, followed.

The notice of action in this case alleged that the defendant on the 8th of September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th of September maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused plaintiff to be brought before him, and to be committed for trial, and to be confined in the common gaol, alleging the subsequent indictment of the plaintiff, his trial on the charge, and his acquittal :—

Held, a good notice of action in trespass. *McGuinness v. Dajoe*, 117.

2. *Summary Conviction—Certiorari—Evidence—Jurisdiction.*—When a summary conviction is re-

moved by *certiorari* and a motion made to quash it, it is the duty of the Court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, to see if there is any evidence whatever shewing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but if there is any evidence at all, it is not the province of the Court to review it as upon an appeal.

Regina v. Coulson, 24 O. R. 246, not followed. *Regina v. Coulson*, 59.

Issue of Distress Warrant—Ministerial Act.]—See PROHIBITION.

LANDLORD AND TENANT.

1. *Right to Distrain—Garnishment of Rent—Suspension of Right to Distrain—Apportionment of Rent*—*R. S. O. ch. 143, secs. 2-6.*]—A landlord's right to distrain is suspended as to that portion of the rent which has accrued up to the garnishment, by the service on the tenant, before such distress, of an order attaching the rent, and distress for such portion is wrongful. *Patterson v. King*, 56.

2. *Distress for Rent*—*R. S. O. ch. 143, sec. 28, sub-sec. 3.*]—A person who goes into actual occupation of premises, under a lease from the agent of a tenant, believing the former to have, but who has not, authority from his principal to let the premises, is in under the tenant within the meaning of sub-section 3 of section 28 of the Landlord and Tenant Act, *R. S. O. ch. 143*, and his goods are liable to distress by the superior landlord. *Farwell v. Jameson*, 141.

3. *Acceleration Clause—Expiry of Lease—Reduction of Rent—Application of Provisions of Old Lease.*]—

A company were assignees of a lease in writing containing a provision for the acceleration of six months' rent in case the tenant became insolvent. Before the expiry of the lease an arrangement was made between the company and the landlord for a reduction of the rent after the expiry of the lease, nothing being said as to the other terms:—

Held, that the arrangement made imported the terms of the old lease, so far as applicable, including the acceleration clause. *Re Canada Coal Co., Dalton's Claim*, 151.

4. *Distress—Withdrawal—Arrangement with Tenant—Second Distress—Fraud*—58 Vict. ch. 26, sec. 4—*Construction of.*]—A landlord may lawfully distrain a second time for the same rent when the first distress is withdrawn by an arrangement for the benefit of the tenant and which arrangement is at an end at the time of the second distress.

Semble, when the withdrawal has been effected through the fraud of the tenant the landlord can again distrain.

Section 4 of 58 Vict. ch. 26 (O.), the Landlord and Tenant Act, 1895, does not take away the common law right of distress, but merely renders it unnecessary that the relation of landlord and tenant should depend upon tenure or service or that a reversion should be necessary to the relation.

In any event the section is not retrospective. *Harpelle v. Carroll*, 240.

5. *Distress—Mortgaged Goods—Agreement between Bailiff and Tenant—Pound Breach*—2 Wm. & M.

sess. 1, ch. 5.]—Where the goods of a tenant, which had been mortgaged by him, were distrained for rent and impounded, and were left on the premises in his charge for over three weeks by agreement between him and the bailiff, when on being advertised for sale under the distress they were seized and taken away by the mortgagee :—

Held, as regards the mortgagee, that the goods were no longer in *custodiâ legis*, and that in taking them he had not committed a breach of the pound within the meaning of 2 Wm. & M. *sess. 1, ch. 5.* *Langtry v. Clark*, 280.

6. *Distress—Conditional Sale of Goods—Lien — Property — “Interest” — Statutes — Repeal — Substitution.*]—An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with, until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question :—

Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent and must be read out as mere surplusage ; and so reading the agreement, the transaction was one of conditional

sale, and, under 57 Vict. ch. 43 (O.), only the interest of the tenant in the goods could be distrained on :—

Held, also, that the Act 57 Vict. ch. 43, which repeals sec. 28, sub-sec. 1, of R. S. O. ch. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by sec. 42 of R. S. O. ch. 143, applied. *Carroll v. Beard*, 349.

7. *Assignment for Creditors — Landlord's Preferential Lien — 58 Vict. ch. 26, sec. 3, sub-secs. 4 and 5 (O.).*]—Under 58 Vict. ch. 26, sec. 3, sub-secs. 4 and 5 (O.), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but also to three months' rent thereafter, whether the assignee retains possession or not ; and in case the assignee elects to retain possession, the lien extends for such further period, over the three months, as the possession lasts. *Clarke v. Reid*, 618.

LANDLORD AND TENANT ACT, 1895.

Distress—58 Vict. ch. 26, sec. 4—Construction of.]—See LANDLORD AND TENANT, 4.

R. S. O. ch. 143, sec. 28, sub-sec. 3 — Sub-tenant—Distress for Rent.]—See LANDLORD AND TENANT, 2.

LAW COURTS ACT, 1895.

Divisional Court—Jurisdiction—Appeal—Section 44, sub-sec. 3.]—See APPEAL.

LEASE.

Acceleration Clause—Expiry of Lease—Reduction of Rent—Application of Provisions of Old Lease.—
See LANDLORD AND TENANT, 3.

LEGACY.

Vested Share—"Legal Personal Representatives."—See WILL, 4.

LEGAL CRUELTY.

See ALIMONY, 2.

LIBEL.

Newspaper—Notice of Action—Service of—R. S. O. ch. 57, sec. 5.—
See DEFAMATION.

LIEN.

1. *Mechanics' Lien—Repairs by Lessee—Interest of Lessor—"Owner"—Scenic Artist.*—The lessor in a lease which provides that certain repairs shall be done by the lessee and the cost deducted from the rent is not, as regards persons employed to do such repairs, an "owner" within the meaning of sub-section 3 of section 2 of R. S. O. ch. 126, the Mechanics' Lien Act.

Semble, a scenic artist is not a "mechanic, labourer, or other person, who performs labour, etc.," under section 6 (1) of the Act.

Quere, whether movable scenery and flying stages in a theatre are part of the freehold. *Garing v. Hunt and Claris*, 149.

2. *Mechanics' Lien—Prior Mortgage—Increased Value—Rights of Lienholder and Mortgagee—Destruction of Property—Period of Ascertainment of Value.*—Where on a reference in a mechanics' lien proceeding, it is found as between a lienholder and a prior mortgagee, that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lienholder, who under sub-section 3 of section 5 of the Mechanics' Lien Act, is declared entitled to rank on such increased value in priority to the mortgage, and pending the proceedings the premises are destroyed by fire, the claim of the lienholder is at end so far as the interests of the mortgagee are affected by it.

Semble, The amount of the increased value to which the lienholder is entitled to resort as against the mortgagee cannot be ascertained until the property has been sold. *Patrick v. Walbourne*, 221.

See EQUITABLE ASSIGNMENT.

LIFE INSURANCE.

See INSURANCE, 2, 3.

LIMITATION OF ACTIONS.

1. *R. S. O. ch. 111—Purchase of Farm—Possession by Son of Purchaser—Payment of Mortgage—Contribution by Son—"Profits of the Land"—"Rent."*—In March, 1881, the plaintiffs' testator purchased a farm and had it conveyed to himself, giving a mortgage for the balance of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon

an understanding that he should contribute such sum as could be spared off the farm, after its yielding a living to him, towards payment of the mortgage thereon, until it should be paid, when, on payment of an annuity to his father and mother, he was to have the farm. No payments were made by him on account of the annuity. He continued in actual possession and occupation from April, 1881, till his death in November, 1892, and contributed towards payment of the mortgage, which, by means of his contributions and payments made by his father, was paid off. His father declined to give him a conveyance, but said he would leave him the farm by will. He died before his father, leaving all his property by will to his wife and child. The father subsequently devised the farm to the plaintiffs and died in 1894, the son's widow continuing in possession. In an action of ejectment brought against her by the plaintiffs:—

Held, MEREDITH, J., dissenting, that the son was not a tenant from year to year nor a lessee, and the money he contributed was not "rent" nor "profits of the land;" and there being no acknowledgment by the son in writing, nor anything else which could stop the running of the statute, the title of the father was extinguished, under sec. 15 of R. S. O. ch. 111, at least six months before the death of the son. *Henderson v. Henderson*, 93.

2. *Trespasser—Possession—Tax Title—R. S. O. ch. 111, sec. 5, sub-sec. 4—Construction of.*]—A person claiming title by possession to land derived through prior trespassers, and by his own possession, can only acquire a title to the land of which

there has been actual possession for the statutory period.

Sub-sec. 4 of sec. 5 of the Real Property Limitations Act, R. S. O. ch. 111, requiring twenty years' possession as to non-cultivated lands, only operates in favour of the patentee and those claiming under him, and not to a title acquired under a sale for taxes. *Brooke v. Gibson*, 218.

3. *Sale of Land—Trustee and Cestui que Trust—Possession by Cestui que Trust—Non-effective Right of Entry—Mortgage by Trustee—Registry Act—Priority.*]—The relationship arising out of an agreement for the sale of land on payment of the purchase money and the taking of possession by the purchaser is that of trustee and *cestui que trust*, and as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the possession of the *cestui que trust*.

The principle of the decision in *Warren v. Murray*, [1894] 2 Q. B. 648, applied.

A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that anyone other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the *cestui que trust* is entitled to set up the provision of the Registry Act, which is retrospective, and to plead it, if it is necessary to do so.

Bell v. Walker, 20 Gr. 558; *Gray v. Ball*, 23 Gr. 390, followed. *The Building and Loan Association v. Poaps*, 470.

Land—Possession—Tax Title—R. S. O. ch. 111, sec. 5, sub-sec. 4.]—*See* LIMITATION OF ACTIONS, 2.

Locatee—Partition.—See CROWN LANDS.

Statute of Limitations—Ejectment—Possession—Defendant not Claiming under Patentee.—See EJECTMENT.

Trusts and Trustees—Trustee Act 1891, sec. 13, sub-sec. 1 (a) and (b)—Commencement of Statute—Acknowledgment.—See WILL, 2.

Unity of Possession—Interruption—Easement.—See WAY, 2.

LOCATEE.

Free Grant Lands—Execution—Debt Incurred before Location.—See EXECUTION.

Partition—Jurisdiction—Declaratory Relief—Statute of Limitations—R. S. O. ch. 44, sec. 21, sub-sec. 7.—See CROWN LANDS.

LORD'S DAY ACT

Street Railways—R. S. O. ch. 203, sec. 1—Conveying Travellers.—See SUNDAY.

LOST GRANT.

Doctrine of—Easement.—See WAY, 2.

MANDAMUS.

Action for—Rule 1112—Railways—Damages—53 Vict. ch. 28, sec. 2 (D.).—The prerequisites to be observed to obtain a prerogative writ of mandamus are not essential where there is a right of action for a man-

damus, namely, where under Rule 1112 the plaintiff is personally interested in the fulfilment of a duty of a quasi public character, as in this case the omission of a railway company to properly fence their tracks.

The damages under section 2 of 53 Vict. ch. 28 (D.), are limited to injuries caused to animals by the company's trains or engines; damages incurred in watching cattle by reason of the bad state of the fences, are not recoverable. *Young v. Erie and Huron R. W. Co.*, 530.

MARRIAGE SETTLEMENT.

Mortgage Investments—Loss in Realization—Apportionment.—See TRUSTS.

MARRIED WOMAN'S PROPERTY ACT.

R. S. O. ch. 132, sec. 5—"Employment or Occupation"—Board and Lodging.—See HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

1. *Workmen's Compensation for Injuries Act, 1892—55 Vict. ch. 30 (O.), sec. 3, sub-sec. 3—Negligence of Person to whose Orders Workmen bound to Conform—Custom of Business.*—The plaintiff was injured in using a derrick in connection with the construction by the defendants of a building. It appeared that the custom or manner of conducting the work was that the oldest man working on the derrick was understood to be in charge of it, and A. being such oldest man and having been ordered by the foreman of the stone branch

so to lift a stone which had by the foreman's orders been prepared in a particular way for lifting with "dogs," directed the plaintiff to assist in lifting the stone with the "dogs," instead of having it wrapped in chains as would have been proper, and the stone fell and injured the plaintiff:—

Held, that A. was a person in the service of the employer to whose orders the plaintiff "was bound to conform and did conform" within the meaning of 55 Vict. ch. 30, sec. 3 (O.), sub-sec. 3. [Reversed on Appeal, 23 A. R. 238.] *Garland v. Corporation of City of Toronto*, 154.

2. *General Hiring—Hiring for a Year—Question of Fact—Corporations—Implied Contract of Company.*—The plaintiff having been for many years superintendent of a factory at a salary, was still under engagement for the current year when the factory and business were purchased by a joint stock company, the employment of the plaintiff continuing without further express agreement until after the expiration of the year, when he was dismissed on refusing to submit to a reduction of salary:—

Held, that whether the plaintiff's hiring at the time of his dismissal, was for a year or not, and whether it was terminable by written notice or not, both of which were questions of fact and not of law, no reasonable notice had been given in this case, and he was entitled to damages.

A general hiring is not necessarily to be considered a hiring for a year.

The increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has modified the law as to contracts of trading corporations, so as to correspondingly

increase their liability on implied contracts.

Finlay v. The Bristol and Exeter R. W. Co., 7 Exch. 409, considered. *Bain v. Anderson*, 369.

MECHANICS' LIEN.

Prior Mortgage—Increased Value—Rights by Lien-holder—Destruction by Fire—Ascertainment of Increased Value.—See LIEN, 2.

Repairs by Lessee—Deduction from Rent—Interest of Lessor—"Owner"—Scenic Artist—R. S. O. ch. 126, sec. 2, sub-sec. 3, sec. 6 (1).—See LIEN, 1.

MEDICAL PRACTITIONER.

Practising Medicine—Ontario Medical Act, R. S. O. ch. 148, sec. 45.

—The defendant was convicted under the Ontario Medical Act, R. S. O. ch. 148, sec. 45, for practising medicine for hire. The evidence shewed that when the complainant went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicine, after learning the symptoms; and that, upon the advice of the defendant, he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon:—

Held, that there was evidence to support the conviction.

Regina v. Coulson, 24 O. R. 246, distinguished.

Regina v. Howarth, *ib.* 561, followed. *Regina v. Coulson*, 59.

MERCANTILE AMENDMENT ACT.

Chose in Action—Parol Assignment of.]—See CHOSE IN ACTION, 2.

MORTGAGE.

1. *Larceny—Consideration—Mitigation of Sentence—Validity.*]—The defendant while a prisoner arrested on a charge of larceny sent for the agent of the owner of the property stolen and, admitting his guilt, offered to give security by mortgage for the value of the goods stolen. The agent informed him he would have to take his trial whether he gave a mortgage or not, and that he could not release him from his position even if he secured him, but after the security was given he let him know that he would endeavour to get a mitigation of the sentence, which he afterwards did :—

Held, that there was no sufficient evidence that there was any agreement to stifle the prosecution and that the security was valid ; STREET, J., dissenting, being of opinion that the evidence shewed that an agreement or understanding to give the security was come to before it was given. *Henry v. Dickie*, 416.

2. *Several Parcels—Sale Under Power, en bloc—Duty of Mortgagees—Damages.*]—The mortgagees, in a mortgage containing two parcels of land, a farm with buildings, and some village lots with stores thereon, about three quarters of a mile distant from the farm, sold the property *en bloc*, under the power of sale in the mortgage, for a much smaller sum, as shewn by the evidence, than would have been realized had the properties been sold separately :—

Held, that the mortgagees had not acted with that prudence and discretion which they were bound to do, and that they were liable to the mortgagors for the amount that might have been realized. Decision of MACMAHON, J., reversed. *Aldrich v. Canada Permanent Loan and Savings Co.*, 548.

Assignment of—Extension of Time—New Mortgage—Parol Reservation of Rights—Purchaser of Equity.]—See PRINCIPAL AND SURETY, 1.

Chattel—Insurance—Assignment of Mortgage—Equitable Assignee of Insurance Money.]—See BILLS OF SALE, 2.

Chattels — Distress — Pound Breach.]—See LANDLORD AND TENANT, 5.

Sale of Land—Mortgage by Vendor—Mortgagee without Notice.]—See LIMITATION OF ACTIONS, 3.

MUNICIPAL AMENDMENT ACT, 1894.

Section 13—Defective Sidewalk—Notice of Action—Pleading.]—See MUNICIPAL CORPORATIONS, 3.

MUNICIPAL CORPORATIONS.

1. *Private Approach to and from Highway—Non-repair—Accident—Liability of Private Person.*]—A person who, with the knowledge of, and without objection by, a municipal corporation, constructs across a ditch between the sidewalk and crown of the highway an approach therefrom to enable vehicles to pass.

to and from his property, adjacent to the highway, is liable for injuries sustained, through want of repair of the approach, by a person using it to cross the highway. *Hopkins v. Corporation of the Town of Owen Sound*, 43.

2. *Negligence — Way — Want of Repair — Overhead Obstruction — Liability — Finding of Jury — Contributory Negligence — Damages.*— Anything which exists or is allowed to remain above a highway, interfering with its ordinary and reasonable use, constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway.

A branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at a height of about eleven feet. The plaintiff, in endeavouring to pass under the branch, on the top of a load of hay, was brushed off by it and injured :—

Held, that the jury having found that the highway was out of repair, the defendants were liable.

Embler v. Town of Wallkill, 57 Hun 384, specially referred to.

The question whether a highway is out of repair is a question for the jury.

Derochie v. Town of Cornwall, 21 A. R. 279, followed.

It appeared by the evidence that the plaintiff had hauled hay upon this road and past this particular place not long before ; that he and another man who was on the load with him, when approaching the branch, observed the situation, but concluded they could pass in safety ; that the other man did pass safely under the branch, and the plaintiff, instead of lying close to the hay, put

up his feet to raise the limb, which he failed to do :—

Held, that the plaintiff was not called upon to do the very best and wisest thing ; and upon this evidence the Court could not interfere with the finding of the jury that the accident might not have been avoided by the exercise of reasonable care on the part of the plaintiff.

Connell v. Town of Prescott, 22 S. C. R., at pp. 162-3, referred to :—

Held, also, upon the evidence, that the sum assessed as damages, \$1,200, was not so excessive as to warrant the Court in interfering. *Ferguson v. Township of Southwold*, 66.

3. *Negligence — Defective Sidewalk — Notice of Action — Pleading*—57 Vict. ch. 50, sec. 13 (O.).— The defence of want of notice of action required by section 13 of the Municipal Amendment Act, 1894, in an action against a municipal corporation for injuries sustained through a defective sidewalk should be set up in the statement of defence if the statement of claim is silent on the point, and the Judge can then go into the circumstances, if any, which excuse the want or insufficiency of the notice.

And where the objection, in such a case, to the want of notice was not raised until after the evidence was closed, a motion for a nonsuit was refused. *Longbottom v. The Corporation of the City of Toronto*, 198.

4. *Way — By-laws Transferring and Assuming Roads — Invalidity.*— A township corporation on which has devolved a portion of a public road situate within its territorial limits, relinquished by the Minister of Public Works under section 52 of 31 Vict. ch. 12 (D.), cannot authorize another township corporation to

assume control of and keep in repair such portion of the road, nor can the latter township assume the road and lawfully collect tolls thereon, and by-laws passed for such purpose are invalid.

Corporation of Ancaster v. Durrant, 32 C. P. 563, distinguished. *Smith v. The Corporation of the Township of Ancaster*, 276.

5. *Expenditure of Public Money—Contribution to Costs of Private Action—Injunction.*—A ratepayer having brought an action against a gas company on behalf of himself and all other consumers of gas for an account of moneys alleged to have been improperly obtained in the past from gas consumers and with the intent of reducing the price of gas to them, the defendants' executive committee reported in favour of authorizing the city council to grant money to carry on the action:—

Held, that the plaintiff was entitled to an injunction to restrain any such payment by the defendants, the same being without consideration and not in pursuance of any prior agreement or understanding. *Jarvis v. Fleming*, 309.

6. *Municipal Elections—Disqualification—Exemption without Contract—Property Qualification*—55 Vict. ch. 42, secs. 73, 86—56 Vict. ch. 35 (O.), sec. 4.]—In 1892 a city council passed a by-law exempting the property of the partnership of the respondent, who had been elected alderman, from taxation except as to school rates, for a period of seven years:—

Held, that the exemption, not being founded upon any contract but being an exemption without a contract, as provided for by 56 Vict.

ch. 35, sec. 4 (O.), there was no disqualification.

Regina ex rel. Lee v. Gilmour, 8 P. R. 514, distinguished:—

Held, also, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property, the four partners being rated for this property as freeholders to the amount of \$10,000: 55 Vict. ch. 42 (O.), sub-secs. 73 and 86.

The words "exempt from taxation" in 56 Vict. ch. 35, sec. 4, mean exempt from payment of all taxes, including school rates. *Regina ex rel. Harding v. Bennett*, 314.

7. *County By-law—Guaranteeing Debentures of Town—Assent of Electors—By-law of Town—Time of Passing—Form of By-law—Guaranty—Liability.*—The assent of the electors is not required to make valid a by-law of the council of a county corporation, passed under sec. 511, sub-sec. 2, of the Consolidated Municipal Act, 1892, guaranteeing the debentures of a municipality within the county.

At the time such a county by-law was passed, the by-law of the minor municipality authorizing the issue of the debentures had not been finally passed, but had been provisionally adopted and had received the assent of the electors, in accordance with sec. 293, and the form that the guaranty of the county was to take was such that it could not actually be given until after the final passing of the by-law of the minor municipality:—

Held, that, under the circumstances, the county by-law was not prematurely passed.

The by-law in question enacted: (1) that the corporation "do hereby

guarantee the due payment of the debentures," etc.; (2) that upon each debenture should be written "payment hereof guaranteed by the corporation of the county," etc.; (3) that the warden and clerk should sign and seal such guaranty on each debenture; (4) that when so signed the corporation should be liable to the holders of the debentures and responsible for the due payment thereof:—

Held, that the by-law did not impose upon the county corporation any greater liability than that of guarantors. *Re Kerr and County of Lambton*, 334.

8. *Drainage By-law—Engineer's Report—Erroneous Basis of Fact.*—A township by-law for repairing and deepening a drain extending through three municipalities set out the report of the engineer recommending the work and assessing the cost in different proportions against them, respectively, but he based his report upon the assumption that the drain had been originally constructed as one drain whereas it consisted of at least two drains built at different times and for different purposes:—

Held, that the by-law must be quashed, for the persons affected were on being assessed entitled to have the engineer's judgment upon the true state of facts, as was also the council when acting on his report. *In re Stonehouse and The Corporation of the Township of Plymouth*, 541.

9. *Licenses—Petty Chapman—Ultra Vires—Damages.*—A municipal corporation, whose existence is derived solely from the statute creating it, is not liable for damages arising out of the enforcement of a by-law passed under misconstruction of its powers, unless such liability is

expressly or impliedly imposed by statute.

A city corporation acting in excess of its powers passed a by-law amending an existing by-law for licensing pedlars, prohibiting them from peddling on certain streets, and the officers of the corporation in carrying out the by-law declined to issue licenses except in the restricted form, which the plaintiff refused to accept, and while attempting to peddle without a license, he was interfered with by the police, over whom the corporation had no control:—

Held, that the corporation were not liable therefor.

Nor does any liability arise where a licensee, who takes out a license under such a by-law, in the restricted form, is damnified by being prevented by the police from peddling on prohibited streets. *Pocock v. The Corporation of the City of Toronto*, 635; *Ferrier v. The Corporation of the City of Toronto*, 635.

10. *Negligence—Way—Opening—Invitation—Accident—Land Adjoining Highway.*—Where the plaintiff, instead of taking the way provided for access to and from his premises, left it and proceeded to his destination upon a track belonging to the defendants, which, to his knowledge, was not a street or way completed for use or opened for public travel, no invitation or inducement being held out by the defendants to the public to travel upon it, and on which he, owing to irregularities on its surface, fell and was injured:—

Held, that he could not recover damages for his injury:—

Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a

dangerous state from snow and ice, and sustained the injury upon the adjoining land. *Noverre v. City of Toronto*, 651.

Municipal Elections—Penalties—Prior and Subsequent Enactments as to same Offence—Repugnancy.]—See MUNICIPAL ELECTIONS.

Police Magistrate—Salary of—R. S. O. ch. 72.]—See POLICE MAGISTRATE.

MUNICIPAL ELECTIONS.

Personation—Conviction—Prior and Subsequent Enactment as to same Offence—Repugnancy—55 Vict. ch. 42, secs. 167 and 210 (O.).]—Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter.

This principle being applied to sections 167 and 210 of the "Consolidated Municipal Act 1892," a person convicted of personation under the former clause was discharged as illegally convicted on a return to a *habeas corpus*.

Robinson v. Emerson, 4 H. & C. 352, and *Mitchell v. Brown*, 1 Ell. & Ell., at p. 275, followed. *Regina v. Rose*, 195.

Disqualification—Exemption from Taxes without Contract—55 Vict. ch. 42, secs. 73, 86—56 Vict. ch. 35, sec. 4 (O.).]—See MUNICIPAL CORPORATIONS, 6.

NEGLIGENCE.

Private Approach to and from Highway—Non-repair—Liability of Private Person.]—See MUNICIPAL CORPORATIONS, 1.

Railways—Moving Train—Postal Car—Bare Licensee—Accident.]—See RAILWAYS, 1.

NOTICE.

Assignment of Non-negotiable Chose in Action Without Notice—Equities.]—See CHOSE IN ACTION, 1.

Certiorari—Notice to Magistrate—Contempt.]—See CONTEMPT OF COURT.

NOTICE OF ACTION.

Libel—Newspaper—Service of—R. S. O. ch. 57, sec. 5.]—See DEFAMATION.

Municipal Corporations—Defective Sidewalk—Pleading—57 Vict. ch. 50, sec. 13 (O.).]—See MUNICIPAL CORPORATIONS, 3.

Sufficiency of—Magistrate—Issue of Warrant—Absence of Information—Trespass.]—See JUSTICE OF THE PEACE, 1.

ONTARIO GAME PROTECTION ACT.

Permitting Deer Hounds to Run at Large—Scienter—56 Vict. ch. 49, sec. 2, sub-sec. 2 (O.).]—See GAME.

THE ONTARIO MEDICAL ACT.

Section 45—Practising Medicine.]
—See MEDICAL PRACTITIONER.

ONTARIO VOTERS' LISTS ACT, 1889.

Action for Penalties—Notice of Action—Officer.]—See PARLIAM-
ENTARY ELECTIONS.

PARLIAMENTARY ELECTIONS.

Ontario Voters Lists Act, 1889—
Notice of Action—Action for Pen-
alties—Officer—52 Vict. ch. 3—R.
S. O. ch. 73.]—A clerk of a mun-
icipality is not an officer within the
meaning of R. S. O. ch. 73, in re-
spect to the performance in that
capacity of the duties prescribed by
the Ontario Voters Lists Act, 1889,
52 Vict. ch. 3, and is not entitled
in an action for the penalties im-
posed for default in that regard, to
the protection of the above revised
statute. McVittie v. O'Brien, 710.

PEDLARS.

Municipal Corporations—Ultra
Vires By-law—Damages.]—See MU-
NICIPAL CORPORATIONS, 9.

PHARMACY ACT.

Departmental Store—Drug De-
partment—Uncertificated Proprietor
R. S. O. ch. 151, sec. 24.]—The de-
fendant being owner of a depart-
mental store, opened a drug depart-
ment therein and placed it under
the sole control of a duly qualified
and registered chemist who sold the

drugs in the defendant's name, re-
ceiving as remuneration a weekly
salary and also a percentage of pro-
fits, the defendant himself not being
a duly qualified and registered che-
mist :—

Held, that the defendant was lia-
ble to be convicted under section 24
of the Pharmacy Act, R. S. O. ch.
151, for keeping an open shop for
retailing, dispensing and compound-
ing poisons, etc., contrary to its pro-
visions. *The Queen ex rel. Warner*
v. Simpson, 601.

PLEADING.

Notice of Action—Municipal Cor-
porations—Defective Sidewalk.]—
See MUNICIPAL CORPORATIONS, 3.

POLICE MAGISTRATE.

Ratepayer of Municipality to which
Fine Payable—Payment by Salary
—Disqualification.]—Section 419(a)
of the Municipal Act, 1892, which
provides that a magistrate shall not
be disqualified from acting as such
by reason of the fine or penalty, or
part thereof, on conviction going to
the municipality of which he is a
ratepayer, includes a police magis-
trate.

Where a police magistrate ap-
pointed under R. S. O. ch. 72, is
paid a salary by the municipality
instead of by fees, such salary being
in no way dependent on any fines
which he may impose, he has no
pecuniary interest in the fines, and
so is not thereby disqualified.

Semble, that in such a case there
would have been no disqualification
at common law. *Regina v. Flem-*
ing, 122.

POSSESSION.

Title by—Trespasser—Tax Title
—*R. S. O. ch. 111, sec. 5, sub-sec. 4.*
—*See LIMITATION OF ACTIONS, 2.*

PRACTICE.

Division Courts—Trial—Postponement of Formal Judgment—Division Court—Appeal.—*See BILLS OF EXCHANGE AND PROMISSORY NOTES.*

PRESUMPTION.

Action for Recovery of Land—Possession—Evidence.—*See EJECTMENT.*

PRINCIPAL AND AGENT.

Insurance Agent—Taking Note for Premium.—*See INSURANCE, 2.*

PRINCIPAL AND SURETY.

1. *Assignment of Mortgage—Covenant—Construction—Extension of Time—New Mortgage—Reservation of Rights—Agreement—Parol Evidence.*—A covenant by the assignor with the assignee in an assignment of mortgage that the mortgage moneys shall be duly paid makes the assignor a surety for the mortgagor as to such payment.

Darling v. McLean, 20 U. C. R. 372, followed.

Gordon v. Martin, Fitz-G. 302, and *Guild v. Conrad*, [1894] 2 Q. B. 885, distinguished.

On the maturity and nonpayment of a mortgage, the grantee of the equity of redemption, who had covenanted with the mortgagor to

pay the mortgage moneys, executed a new mortgage to the holder, through several mesne assignments, of the original mortgage, the new mortgage extending the time for payment of the principal and reducing the rate of interest, the mortgagee refusing to discharge the original mortgage, and verbally reserving his rights against the assignor to him of that mortgage, who had covenanted that the mortgage moneys should be paid:—

Held, that parol evidence of the reservation of rights against the surety was admissible:—

Held, also, that owing to the reservation of rights against the surety the extension of time given by the new mortgage did not interfere with the right of the surety to proceed against the original mortgagor. *Trusts Corporation of Ontario v. Hood*, 135.

2. *Advance to Wife—Charge on Her Estate—Covenant of Husband and Wife—"Ordinary Legal Rights"—Account.*—A married woman who, under the terms of her father's will was entitled to receive her share of his estate on coming of age, agreed, on attaining her majority, with the other beneficiaries, to postpone the division. An agreement was afterwards executed between the husband, wife, and the trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys which she agreed to repay within a specified period, the advance being made a charge on her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of nonpayment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement

for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in any wise effect or prejudice the ordinary legal rights" of the trustee to enforce payment:—

Held, that, notwithstanding the latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on. *Lee v. Ellis*, 608.

Signature by Holder of Note under Maker's Name.—See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

PROHIBITION.

Justice of the Peace—Issue of Distress Warrant.—Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a Justice of the Peace upon a conviction regular on its face, and which was within the jurisdiction of the Justice making it, such acts being ministerial, not judicial.

Judgment of *Rose, J.*, 26 O. R. 685, reversed. *Regina v. Coursey*, 181.

Promissory Note Payable in Instalments—Jurisdiction of Division Courts.—See **DIVISION COURTS**, 1.

PROMISSORY NOTES.

Payable by Instalments—Action in Division Court.—See **DIVISION COURTS**, 1.

See also **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

PROMOTERS.

Liability for Debts Incurred before Incorporation.—See **COMPANY**, 2.

PUBLIC SCHOOLS.

Union School Section—Alteration—Petition of Ratepayers—Award—54 Vict. ch. 55, sec. 87 (O.).—The "joint petition" of five ratepayers from each of the municipalities concerned, required under 54 Vict. ch. 55, sec. 87, sub-sec. 1 (O.), for the formation, alteration or dissolution of a Union School Section, means that each set of five ratepayers shall join in a petition to the municipal council of the municipality, of which they are ratepayers, and not that five ratepayers from each municipality concerned must join in each petition to each municipality.

Judgment of *Meredith, C. J.*, 26 O. R. 662, following *Trustees of School Section No. 6, York v. Corporation of York*, noted 26 O. R., at p. 664, reversed.

Where the award in such case was that no action should be taken on the petition, the prohibition in sub-section 11 of section 87 against any new proceedings for a further period of five years, was held not to apply. Judgment of *Meredith, C. J.*, affirmed on this point. *Union School Section of East and West Wawanosh, and Hullett v. Lockhart*, 345.

RAILWAYS.

1. *Moving Train—Postal Car—Bare Licensees—Accident—Negligence.*—The plaintiff in attempting to post a letter on a train which had just commenced to move out of a

station, and to which was attached a postal car with an opening in the door for posting letters provided by direction of the Post Office Department for the use of the public, while following the car tripped and fell and was injured, as was alleged, on a stake some inches out of the ground, which had been planted by the defendants, for the furtherance of alterations being made in the station :—

Held, that the plaintiff was a bare licensee upon the premises of the defendants, who under the circumstances, were not liable to him.

Judgment of MEREDITH, C. J., at the trial affirmed. *Spence v. Grand Trunk R. W. Co.*, 303.

2. *Arbitration*—51 *Vict. ch. 29, sec. 150 (D.)*—“*Opposite Party*”—*Mortgagor and Mortgagee*.]—The words “opposite party” in sec. 150 of the Dominion Railway Act, 51 *Vict. ch. 29, sec. 150*, must be read so as to include both mortgagor and mortgagee, and both must concur in the appointment of an arbitrator to determine the compensation to be paid for mortgaged land required for the railway. *Re Toronto, Hamilton and Buffalo R. W. Co. and Burke*, 690.

3. *Passenger—Ticket*—“*Station*”—*Access to—Expropriation of Land*—*Use of Railway Lines—Necessity*—*Invitation—Passenger Lawfully upon the Railway—Negligence—Passing Train—Neglect to give Warning—Liability*.]—The plaintiffs’ testator, the purchaser of a ticket from the defendants entitling him to travel on their railway from a certain station to the station nearest his place of residence, took a train from the former to the latter station, although notified by the de-

fendants that it would not go beyond a crossing station, some miles short of his destination by rail, and leaving the train at the crossing station he proceeded to walk home by the railway track, and, going westward and while within a short distance of a highway to the east of the crossing station, he was struck and killed by a following train, which on approaching the highway had omitted to give the statutory warning.

The defendants sold tickets to the crossing station from all their regular stations and received passengers commencing their journey at it; but, although they had the power to expropriate, they had provided no means of access to or from the station and the nearest highways, except their tracks, which they had permitted passengers to use :—

Held, that all persons, whether travelling on a highway or not, are entitled to the benefit of the provisions of section 256 of the “*Railway Act*,” requiring warning by bell or whistle on approaching a highway; and that the deceased had a right to travel on his ticket to the crossing station, which the defendants had recognized as a station, and, being lawfully there, had the right to egress from it, and by necessity to be upon the track, to which the defendants had impliedly invited him, and that the neglect of the statutory provision was evidence of negligence to go to the jury. *Anderson v. Grand Trunk R. W. Co.*, 441.

Cattle—Fences—Damages—53 *Vict. ch. 28 (D.), sec. 2.*]—*See* *MANDAMUS*.

Crossings—Railway Act, 1888—Powers of Railway Committee.]—*See* *CONSTITUTIONAL LAW*.

Dominion Railway Act—Arbitration—"Opposite Party"—Mortgagor and Mortgagee—Section 150.]—See RAILWAYS, 2.

Lands Injurious Affected—Right to Compensation.]—See Hendrie v. The Toronto, Hamilton and Buffalo R. W. Co., 46.

RECEIVER.

Equitable Execution—Pending Action—Unliquidated Damages.]—A receiver will not be appointed by way of equitable execution on behalf of a judgment creditor to receive the amount of a claim for unliquidated damages which his debtor is seeking to recover in a pending action. The Central Bank v. Ellis, 583.

REFERENCE.

Allowance of Interest—58 Vict. ch. 12, sec. 118 (O.).]—See INTEREST.

REGISTRY ACT.

R. S. O. ch. 114, sec. 80—Defect in Proofs for Registration.]—See EQUITABLE ASSIGNMENT.

Sale of Land—Mortgage by Vendor—Mortgagee without Notice.]—See LIMITATION OF ACTIONS, 3.

THE RELIGIOUS INSTITUTIONS ACT.

Minister's Residence—Necessity for User as—R. S. O. ch. 237, secs. 1, 23—38 Vict. ch. 76, sec. 10 (O.).]—See WILL, 3.

RENT.

Garnishment of—Apportionment—Suspension of Right of Distress.]—See LANDLORD AND TENANT, 1.

Statute of Limitations—Payment of Mortgage—R. S. O. ch. 111, sec. 15.]—See LIMITATION OF ACTIONS, 1.

REVENUE.

Succession Duty Act—Present and Future Interests—Duty Payable—Annuity.]—Where a testator divides up his estate so as to create present and future estates or interests, the duty under the Succession Duty Act, 1892, 55 Vict. ch. 6 (O.), is to be assessed on the whole estate at the time of his death, including both the present and future estates or interests, but duty is only payable at the death or within eighteen months thereafter on the present estates or interests; the payment of duty on the future estates being deferred until they become estates in possession or enjoyment, and the duty then payable is not the duty fixed at the time of the death, but that assessed upon the value of such estates or interests at the time the right of possession or enjoyment accrues.

In computing the duty on an annuity payable on a testator's death, and of which there is present actual enjoyment, the duty thereon must be assessed on its then cash value; on a deferred annuity, duty is payable when the right to enjoy it commences.

Duty is also payable on the capital producing an annuity, when it becomes distributable as legacies or as part of the final distribution of the estate. Attorney-General v. Cameron, 380.

RIGHT OF WAY.

Conveyance of "Road."] — See WAY, 1.

RULES OF COURT.

Rule 1112.]—See MANDAMUS.

SALE OF LANDS.

Agreement for Sale—Relationship Arising From.]—See LIMITATION OF ACTIONS, 3.

Attorney for — Personal Obligation.]—See EQUITABLE ASSIGNMENT.

Contract — Offer to Purchase — Withdrawal.]—See CONTRACT.

SCHOOLS.

Public—Union School Section — Alteration—Petition of Ratepayers — Award.]—See PUBLIC SCHOOLS.

SCIRE FACIAS.

Company — Winding-up Act, R. S. C. ch. 129—Contributory—Action against, without leave of Court.]—There is nothing in the Winding-up Act, R. S. C. ch. 129, which makes it a bar, either expressly or by implication, to an action of *scire facias*, brought by a creditor of the company without the leave of the Court against a contributory.

Difference between the Imperial Companies Act, 1862, and the Winding-up Act of Canada pointed out.

Judgment of MEREDITH, J., at the trial reversed. *Shaver v. Cotton*, 131.

SEPARATE ESTATE.

Married Woman's Property Act—Employment or Occupation.]—See HUSBAND AND WIFE, 1.

Married Woman—Personal Articles — Clothing.]—See HUSBAND AND WIFE, 2.

SET-OFF.

Chose in Action—Assignment of.]—See CHOSE IN ACTION, 3.

Purchase of Debt before Assignment—Knowledge of Insolvency—R. S. O. ch. 124, sec. 23.]—See ASSIGNMENT AND PREFERENCES.

STATUTE OF LIMITATIONS.

Ejectment—Patentee — Possession — Defendant not Claiming Under Patentee.]—See EJECTMENT.

STATUTES.

Repeal of Act—Exception—Interpretation Act—Con. Mun. Act, 1892, 55 Vict. ch. 42, sec. 533a (O.)—57 Vict. ch. 50, sec. 14 (O.)—Construction of.]—Section 14 of the Municipal Amendment Act, 1894, 57 Vict. ch. 50 (O.), must be read with sec. 8, sub-secs. 43 and 48 of the Interpretation Act, R. S. O. ch. 1, and so read, rights of action accrued at the passing of the former Act are not affected thereby.

On the 29th of April, 1893, a township corporation obtained an award against a county corporation under sec. 533a of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges expended by them, and

while an appeal against the award was before the Court of Appeal, the 57 Vict. ch. 50 (O.), repealing sec. 533a was passed:—

Held, that there was no "arbitration pending" by reason of the appeal at the time of the passing of the repealing Act.

The plaintiffs were held entitled, notwithstanding the repeal of sec. 533a (O.), to recover the proportionate amount paid or agreed to be paid by them, from the commencement of 1893 to the date of the passing of the repealing Act.

Judgment of MEREDITH, C.J., 26 O. R. 689, varied. *The Corporation of the Township of Morris v. The Corporation of the County of Huron*, 341.

Penalties—Prior and Subsequent Enactments as to Same Offence—Repugnancy.—See MUNICIPAL ELECTIONS, 1.

13 Eliz. ch. 5.]—See FRAUDULENT CONVEYANCE, 1.

29 Car. 2, ch. 3, sec. 4.]—See GUARANTEE.

2 Wm. & M., sess. 1, ch. 5.]—See LANDLORD AND TENANT, 5.

9 Geo. II, ch. 36.]—See WILL, 3.

27-28 Vict. ch. 29, sec. 1 (C.).]—See EJECTMENT.

31 Vict. ch. 12, sec. 52 (D.).]—See MUNICIPAL CORPORATIONS, 4.

38 Vict. ch. 76, sec. 10 (O.).]—See WILL, 3.

R. S. C. ch. 62.]—See COPYRIGHT.

R. S. C. ch. 129.]—See SCIRE FACIAS.

R. S. C. ch. 129, sec. 56.]—See COMPANY, 1.

R. S. O. ch. 1, sec. 8, sub-secs. 43, 48.] See commencement of this title.

R. S. O. ch. 25.]—See EXECUTION.

R. S. O. ch. 44, sec. 21, sub-sec. 7.]—See CROWN LANDS.

R. S. O. ch. 51, secs. 87, 185.]—See DIVISION COURTS, 3.

R. S. O. ch. 51, secs. 242, 243.]—See DIVISION COURTS, 4.

R. S. O. ch. 57, sec. 5, sub-sec. 2.]—See DEFAMATION.

R. S. O. ch. 72.]—See POLICE MAGISTRATE.

R. S. O. ch. 73.]—See PARLIAMENTARY ELECTIONS.

R. S. O. ch. 110, sec. 31.]—See EXECUTORS AND ADMINISTRATORS, 1.

R. S. O. ch. 110, sec. 36.]—See EXECUTORS AND ADMINISTRATORS, 2.

R. S. O. ch. 111.]—See CROWN LANDS.

R. S. O. ch. 111, sec. 5, sub-sec. 4.]—See LIMITATION OF ACTIONS, 2.

R. S. O. ch. 111, sec. 15.]—See LIMITATION OF ACTIONS, 1.

R. S. O. ch. 111, sec. 35.]—See WAY, 2.

R. S. O. ch. 114, sec. 80.]—See EQUITABLE ASSIGNMENT.

R. S. O. ch. 122, sec. 7.]—See CHOSE IN ACTION, 2.

R. S. O. ch. 124, sec. 23.]—See ASSIGNMENT AND PREFERENCES.

R. S. O. ch. 126, sec. 2, sub-sec. 3, sec. 6 (1).]—See LIEN, 1.

R. S. O. ch. 126, sec. 5, sub-sec. 3.]—See LIEN, 2.

R. S. O. ch. 132, sec. 5.]—See HUSBAND AND WIFE, 1.

R. S. O. ch. 136.]—See INSURANCE, 3.

R. S. O. ch. 136, sec. 6 (1).]—See WILL, 1.

R. S. O. ch. 143, secs. 2-6.]—See LANDLORD AND TENANT, 1.

R. S. O. ch. 143, sec. 28, sub-sec. 3—
Sub-tenant — Distress for Rent.]—*See*
LANDLORD AND TENANT, 2.

R. S. O. ch. 148, sec. 45.]—*See* MEDICAL PRACTITIONER.

R. S. O. ch. 151, sec. 24.]—*See* PHARMACY ACT.

R. S. O. ch. 157, sec. 37.]—*See* COMPANY, 3.

R. S. O. ch. 203, sec. 1.]—*See* SUNDAY.

R. S. O. ch. 237, secs. 1, 23.]—*See* WILL, 3.

50 Vict. ch. 85 (O.).]—*See* TORONTO GAS CO.

51 Vict. ch. 29, sec. 150 (D.).]—*See* RAILWAYS, 2.

51 Vict. ch. 29, sec. 256 (D.).]—*See* RAILWAYS, 3.

52 Vict. ch. 3 (O.).]—*See* PARLIAMENTARY ELECTIONS.

52 Vict. ch. 28, sec. 2 (D.).]—*See* MANDAMUS.

53 Vict. ch. 31, secs. 74, 75 (D.).]—*See* BANKS AND BANKING.

53 Vict. ch. 33, sec. 30 (D.).]—*See* EXECUTORS AND ADMINISTRATORS, 1.

54 Vict. ch. 19, sec. 13, sub-sec. 1 (a) and (b) (O.).]—*See* WILL, 2.

54 Vict. ch. 55, sec. 87 (O.).]—*See* PUBLIC SCHOOLS.

55 Vict. ch. 6 (O.).]—*See* REVENUE.

55 Vict. ch. 30, sec. 3, sub-sec. 3 (O.).]—*See* MASTER AND SERVANT, 1.

55 Vict. ch. 42, secs. 73, 86 (O.).]—*See* MUNICIPAL CORPORATIONS, 6.

55 Vict. ch. 42, secs. 167, 210 (O.).]—*See* MUNICIPAL ELECTIONS.

55 Vict. ch. 42, secs. 293, 511, sub-sec. 2 (O.).]—*See* MUNICIPAL CORPORATIONS, 7.

55 Vict. ch. 42, sec. 533 (a) (O.).]—*See* commencement of this title.

55 Vict. ch. 45, sec. 419 (a) (O.).]—*See* POLICE MAGISTRATE.

55-56 Vict. ch. 29, secs. 197, 198 (D.).]—*See* GAMING.

55-56 Vict. ch. 29, secs. 229, 744 (D.).]—*See* CRIMINAL LAW.

55-56 Vict. ch. 29, sec. 889 (D.).]—*See* GAME.

56 Vict. ch. 35, sec. 4 (O.).]—*See* MUNICIPAL CORPORATIONS, 6.

56 Vict. ch. 49, sec. 2, sub-sec. 2 (O.).]—*See* GAME.

57 Vict. ch. 23 (O.).]—*See* CREDITORS' RELIEF ACT.

57 Vict. ch. 43 (O.).]—*See* LANDLORD AND TENANT, 6.

57 Vict. ch. 50, sec. 13 (O.).]—*See* MUNICIPAL CORPORATIONS, 3.

57 Vict. ch. 50, sec. 14 (O.).]—*See* commencement of this title.

58 Vict. ch. 12, sec. 118 (O.).]—*See* INTEREST.

58 Vict. ch. 13 (O.).]—*See* APPEAL.

58 Vict. ch. 26, sec. 3, sub-secs. 4 and 5 (O.).]—*See* LANDLORD AND TENANT, 7.

58 Vict. ch. 26, sec. 4 (O.).]—*See* LANDLORD AND TENANT, 4.

STATUTORY CONDITIONS.

See INSURANCE, 1.

STOCK.

By-law for Allotment by Shareholders—Power of Directors.]—*See* COMPANY, 3.

STREET RAILWAYS.

Lord's Day Act—R. S. O. ch. 203, sec. 1—Conveying Travellers.]—See SUNDAY.

SUCCESSION DUTY ACT, 1892.

Present and Future Interests—Annuity.]—See REVENUE.

SUNDAY.

Street Railways—Lord's Day Act, R. S. O. ch. 203, sec. 1 — Construction—Exception.]—The words "or other person whatsoever" in sec. 1 of the Lord's Day Act, R. S. O. ch. 203, are to be construed as referring to persons ejusdem generis as the persons named, "merchant, tradesman," etc.; and an incorporated company of person operating street cars on Sunday is not within the prohibition of the enactment.

Sandiman v. Breach, 7 B. & C. 96; Regina v. Budway, 8 C. L. T. Occ. N. 269; and Regina v. Somers, 24 O. R. 244, followed.

Seemle, also, that the defendants, if the enactment applied, were within the exception as to "conveying travellers."

Regina v. Daggett, 1 O. R. 537, followed.

Regina v. Tinning, 11 U. C. R. 636, not followed. The Attorney-General for Ontario v. The Hamilton Street R. W. Co., 49.

TAXES.

Municipal Elections—Disqualification—Exemption—56 Vict. ch. 35, sec. 4 (O.).]—See MUNICIPAL CORPORATIONS, 6.

Succession Duty—Present and Future Interests.]—See REVENUE.

TENANT FOR LIFE AND REMAINDERMAN

Rent—Apportionment.]—A tenant for life who had leased the premises of which she was life tenant, died a few days after a half year's rent, which was payable in advance, became due. On the day of her death part of the rent was remitted to her and was received by her executor, to whom the balance was paid on the representation that he was entitled to it:—

Held, that the rent was received by the executor for the use of those entitled to it, and was therefore apportionable between the executor and the remainderman, who had confirmed the possession of the tenant, and that the executor was entitled to an order for repayment by persons, third parties, claiming under the will to whom he had paid it. Dennis v. Hoover, 376.

Marriage Settlement—Mortgage Investments—Loss on Realization—Apportionment.]—See TRUSTS.

TORONTO GAS COMPANY.

Reserve Fund—Plant Renewal Fund—Necessity for Establishment and Maintenance of—Investment of Surplus—Reduction in Price of Gas—50 Vict. ch. 85 (O.).—Construction of Parties—Attorney-General.]—The defendants, an incorporated company, carrying on business in the city of Toronto as manufacturer and suppliers of gas, in 1887 obtained an Act, 50 Vict. ch. 85 (O.), whereby they were empowered to increase

their capital stock from \$1,000,000 to \$2,000,000, such additional stock to be sold by public auction, and the Act provided that the surplus realized over the par value thereof should be added to their reserve fund, which they were thereby authorized to maintain, until the same should equal one-half of their paid-up capital, and that such reserve fund might be invested in Dominion or Provincial stock, municipal debentures, etc.; that a plant and buildings' renewal fund should be created out of the defendants' earnings, to which fund should be placed each year five per cent. on the value of plant and buildings, against which all usual and ordinary renewals and repairs should be charged; and that any surplus of net profit from any source whatever, including premiums on sales of stock after the establishment of the reserve and renewal fund, payment of directors, and a ten per cent. dividend, should be carried to a special account, and on such account becoming equal to five cents per 1,000 cubic feet on the quantity of gas sold in the previous year the price of gas during the then current year should be reduced by at least that amount.

In an action brought by the plaintiffs on behalf of themselves as well as all other consumers of gas:—

Held, that defendants were obliged to include in the rest or reserve fund (a) the moneys standing to the credit of the profit and loss account at the time of the passing of the Act, (b) the moneys to the credit of the contingent account at the same time, (c) and the moneys received from the premiums on the sale of the stock until the fund amounted to fifty per cent. of the paid-up capital; that the provision as to the nature of the investment of the reserve fund was

obligatory, and it was *ultra vires* of the defendants to invest it, or any part of it, in the purchase or construction of plant or buildings, or in the business generally; or to invest the premiums on the sale of stock, or any part thereof, in the erection of buildings until the rest or reserve fund equalled one-half of the paid-up capital:—

Held, also, that the five per cent. directed to be carried to the plant and buildings' renewal fund should be so carried, notwithstanding that the usual and ordinary repairs did not amount to that percentage, and no obligation rested on the defendants to invest any unemployed part of this fund:—

Held, also, that the defendants had no right to write off sums from profits for depreciation in plant:—

Held, lastly, that the plaintiffs could properly maintain the action, and that the Attorney-General was not a necessary party. *Johnston v. Consumers' Gas Co.*, 9.

TRADE NAME.

Geographical Designation—"The Canadian Bookseller"—"*The Canada Bookseller and Stationer*"—*Injunction*.]—As a rule a man cannot have monopoly or property in a geographical name.

The plaintiff having published for a number of years a journal devoted to the interest of the booksellers in Canada, called "The Canadian Bookseller," sought to enjoin the defendants from adopting as the name of a journal published and sold by them, "The Canada Bookseller and Stationer," which for many years had been published by them under another name. There was no evidence

of fraudulent intention on defendant's part :—

Held, that the plaintiff was not entitled to the injunction sought for.

Decision of MACMAHON, J., reversed. *Rose v. McLean Publishing Co.*, 325.

TRUSTS.

Marriage Settlement—Mortgage Investments—Loss on Realization—Apportionment Between Life Tenant and Remainderman.]—Where a loss occurs under a mortgage of trust funds, the income of which is payable to a life tenant, the loss should be apportioned between the tenant for life and the remainderman by adding the amount actually realized from the security to the amount of interest theretofore received by the tenant for life and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received. *In re Foster, Lloyd v. Carr*, 45 Ch. D. 629, followed. *In re Plumb*, 601.

TRUSTEE ACT, 1891.

Limitation of Actions—Commencement of Statute—Acknowledgment.]—See WILL, 2.

UNION SCHOOL SECTION.

Alteration—Petition of Ratepayers—Award.]—See PUBLIC SCHOOLS.

VOTERS LISTS ACT, 1892.

Action for Penalties—Notice of Action—Officer.]—See PARLIAMENTARY ELECTIONS.

WARRANT.

Division Courts—Judgment Debtor—Backing Arrest Outside of County.]—See DIVISION COURTS, 4.

Issue of—Absence of Written Information—Liability of Magistrate.]—See JUSTICE OF THE PEACE, 1.

WAY.

1. *Conveyance of "Road"—Effect of—Grant of Right of Way Merely.*]—A deed, after granting certain land describing it by metes and bounds, continued, "also a road forty feet wide" adding to the description thereof "and not included in the above quantity of land":—

Held, that by the conveyance of the road the fee in the freehold therein did not pass to the grantee, but merely an easement of the right of way over the land.

Review of the American decisions. *Fisher v. Webster*, 35.

2. *Easement—Implication—Prescription—Interruption—Unity of Possession—Unity of Seizin—"Lost Grant"—Tenancy—Estoppel.*]—A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage-way between the two houses, used in common by the occupants of both for the purpose

of getting in wood and coal and getting out ashes. The appellant, the owner of lot 4, had, as was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood :—

Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4.

The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1894, the owner of No. 13 was also the tenant of No. 9 :—

Held, per MEREDITH, C.J., that the unity of possession during that period interrupted the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R. S. O. ch. 111, sec. 35.

Dictum of Hatherley, L.C., in *Ladyman v. Grave*, L. R. 6 Ch. 763, not followed.

But, per *Curiam*, that at all events the *locus* in question could not be treated as a way to lot 4 ; it was rather a way to that portion of lot 5 on which house No. 9 stood ; and there being unity of seizin of the alleged dominant and servient tenements in the devisee of lot 5, no easement could exist while that unity continued ; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation.

Semble, per MEREDITH, C.J., that, but for this latter circumstance, the claim of the appellant might have

been sustained by the application of the doctrine of “lost grant.”

And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant. *Re Cockburn*, 450.

Negligence—Private Way—Accident.]—See MUNICIPAL CORPORATIONS, 10.

Private Approach to and from Highway—Accident—Non-repair—Liability of Private Person.]—See MUNICIPAL CORPORATIONS, 1.

WILL.

1. *Construction—Election—General Words—“My Estate”—Insurance Policies—Apportionment—Variation—R. S. O. ch. 136, sec. 6 (1)—Deficiency of Assets—Legacies—Abatement.*]—Testatrix by her will left all her property, by general words, to her executors, upon trust, *inter alia*, (5) to set apart \$4,500 and pay the income to the plaintiff, one of her sons ; (6) to realize on all the residue of the estate, and, after providing for maintenance of unsold portions, to pay \$1,400 to a second son and \$2,000 to a third, and, when all the residue should be realized, to divide it equally between these two ; (7) after the death of the plaintiff, to divide the \$4,500 among his children, adding—“It is my will that my son Robert” (the plaintiff) “is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life.” Two policies of insurance on her life

formed part of the estate of the testatrix, and she had besides effected an insurance for \$2,000 on her life payable to the three sons, which was in force at the time of her death :—

Held, that the plaintiff was not put to an election between the benefits given to him by the will and his share of the \$2,000 policy :—

Held, also, that the will had not varied the apportionment of the \$2,000 policy, under the powers conferred by R. S. O. ch. 136, sec. 6 (1), and amendments, so as to exclude the plaintiff or put him to his election :—

Held, further, that in the event of the assets not being sufficient to admit of the setting apart of the \$4,500 and the payment of the two legacies of \$1,400 and \$2,000, the \$4,500 was first to be provided for without abatement, and the other two legacies were to come out of the residue and abate in the event of a deficiency. *King v. Yorston*, 1.

2. *Construction*—“*Who may then be Heirs-at-Law*”—*Deed—Delivery—Operation—Trusts and Trustees—Limitation of Actions—Trustee Act, 1891, sec. 13, sub-sec. 1, (a), (b)—Commencement of Statute—Balance in Trustee's Hands—Letter—Acknowledgment—Estoppel.*—The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs forever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such

share should be paid over or conveyed to those “*who may then be the heirs-at-law of my said son,*” share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son, was all real estate :—

Held, per MACMAHON, J., the Judge at the trial, that the words above quoted signified those who would take real estate as upon an intestacy.

Coatsworth v. Carson, 24 O. R. 185, followed.

By deed dated the 2nd March, 1887, the defendant, as surviving trustee, conveyed the lands retained by him as the share of the plaintiff's husband, to his brothers and sisters as his heirs and heiresses-at-law.

This deed was, on the day of its date, signed and sealed by the defendant, and delivered by him to a person acting on behalf of the grantees, and wholly left the possession of the defendant on that day, and there was nothing to shew that he did not intend it to operate immediately :—

Held, by the Divisional Court, that it took effect from the day of its date.

In this action begun on the 8th July, 1893, the plaintiff sought an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her husband's share, which she claimed under a marriage settlement. The defendant pleaded the Trustee Act, 1891, sec. 13, sub-sec. 1 (a) and (b), in bar of the action :—

Held, notwithstanding that a small balance of \$6.35, ascertained as early as the 3rd February, 1887, remained in the defendant's hands until the 21st July, 1887, that the statute began to run in his favour

on the 2nd March, 1887, assuming a breach of trust on that day, and the plaintiff's action was barred before it was begun.

On the 27th September, 1892, the defendant wrote a letter to the plaintiff's solicitors in which he stated that all the affairs of the estate between himself, as trustee, and the heirs were wound-up "as long ago as July, 1887":—

Held, that this was not an acknowledgment which had the effect of taking the case out of the operation of the statute; and the defendant was not estopped by the letter from saying that the conveyance was as early as the 2nd March, 1887.

Judgment of MACMAHON, J., affirmed. *Stephens v. Beatty*, 75.

3. *Devise to Religious Body—Minister's Residence—Necessity for User as—R. S. O. ch. 237, secs. 1, 23—38 Vict. ch. 76, sec. 10—Gift for School Teacher's Residence—Invalidity—9 Geo. II. ch. 36.*—A testator by his will, made more than six months prior to his death, directed that after his wife's death a house and lot should go to the trustees, for the time being, of a named Presbyterian Church for a manse, if required, or that it might be kept in good repair and rented for the benefit of the congregation. The widow died shortly before the commencement of this action, which was for the construction of the will, and the land had not yet been used for a manse:—

Held, that the devise was valid, for section 23 of the Religious Institutions Act, R. S. O. ch. 237, and sec. 10 of 38 Vict. ch. 76 (O.), enabled the trustees to take land for a minister's residence, if actually used as such, although it could not be held merely for the purposes of rental:

that an intention not to so use it would not be presumed from the non-user for the short period that had elapsed since the widow's death; but that, in any event, the effect of such non-user would be that the interest of the trustees in the property could be sold within seven years, as provided for by that section, or that the property would revert to the testator's heirs; and, *semble*, that the trustees could legally sell.

By another clause, certain other land was devised to the trustees of a named common school section, on which a teacher's residence might be erected, or that it might be rented for the benefit of the school funds, subject, however, to a condition of preserving and keeping in order an adjoining plot:—

Held, a devise for charitable purposes within the 9th Geo. II. ch. 36, and so void. *Sills v. Warner*, 266.

4. *Legacy—"Legal Personal Representatives"—Vested Share.*—Devise of land to executors and trustees upon trust to allow the testator's wife to use and occupy it during her life and after her death to sell and pay, among other legacies, a moiety of the purchase money to his son, with a provision that if any of the legatees died before their shares should be paid over, the share of the person so dying should be paid to his "legal personal representative."

The son assigned his share to the plaintiff, and died before his mother and before payment:—

Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executor and administrator as "legal personal representative," and that the plaintiff was entitled. *Kerr v. Smith*, 409.

5. *Widow — Legacy — Dower — Election—Estoppel.*]—A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity, provision being made for the early conversion into money and distribution of the estate:—

Held, that the widow was not put to her election, but was entitled both to her legacy and to dower.

The will further provided that the widow for her legacy might have the first selection of such securities or real estate as she might think desirable. Without making any claim to dower, she joined with her co-executors in sales and conveyances of parts of the real estate, and selected the remainder of it in part satisfaction of her legacy, and, although not transferred to her, subsequently dealt with such remainder as her own. It was not until after the sales and selection referred to that her right to dower was in any way considered, when she immediately claimed it:—

Held, that, under these circumstances, the residuary legatees not having been prejudiced by her dealings with the lands selected by her, she was not estopped from claiming dower; but was entitled to treat the executors as having received for her use so much of the purchase money of the lands sold as was equal to the value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the Court of the lands free of her dower, and so much of the sum at which the lands selected by her were valued at as was equal to

the value of her dower in those lands, ascertained in the same way. *Bingham v. Bingham*, 1 Ves. Sen. 126, applied. *Elliott v. Morris*, 485.

6. *Construction — Devise — Incumbrances — Exoneration—Widow —Dower—Election —Remainder —Acceleration.*]—By paragraph 3 of his will, made in 1886, the testator, who died in 1895, devised house No. 35, until 1st January, 1890, to his wife, and from and after that to his brother, "his heirs and assigns forever, free from all incumbrances." This property together with house No. 45, which, by paragraph 6, he devised, with other lands, to his wife for life, and after her decease to his brother, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for \$1,200, made by the testator, which was subsequently discharged and replaced by a mortgage for \$1,300 on the same lands, which was that subsisting at the date of the death. By paragraph 4 the testator bequeathed to his wife certain leasehold premises held by him at the date of his will. The term, however, expired in his lifetime, and nothing passed to his wife under this paragraph. By paragraph 5 the testator directed his wife to pay off the mortgage for \$1,200, and any other incumbrances upon the property devised by paragraph 3, and declared that the bequests made to the wife by paragraphs 3 and 4 were made to her for that purpose:—

Held, that the effect of the will was to exonerate house No. 35, to the extent of the interest in it devised to the brother, from the payment of the proportionate part of the mortgage, and to cast the burden of the payment of it upon

the residuary estate, leaving the other house to bear its proportionate share of the mortgage.

2. That the devisee of house No. 35 was not entitled to have the dower of the widow in it discharged out of the residuary estate, she having elected to take her dower instead of the provision made for her by the will.

3. Paragraph 7 provided, in the event of the brother dying before the wife, for a sale of what the will described as "all my said property," and directed that the proceeds of the sale should be invested and the interest of the investment paid to certain persons for their lives, and for the division of the corpus, after the death of the survivor, among certain persons named :—

Held, that the provisions of paragraph 7 applied only to the devise contained in paragraph 6, and not to that in paragraph 3.

4. That the effect of the disclaimer by the widow of the provision made for her by the will was to accelerate the brother's remainder and make it an estate in possession. *Toronto General Trusts Co. v. Irwin*, 491.

7. *Construction—Absence of Material Words—Uncertainty—Devise.*—A testator by his will provided as follows :—"It is my will that as to all my estate both real and personal, whether in possession, expectancy or otherwise, which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will" :—

Held, not void for uncertainty, and a devise to the testator's wife in fee. *May v. Logie*, 501.

8. *Election—Period of Accounting—Interest.*—Testator by his will

left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will :—

Held, that her election related back to, and she was liable to account from, the date of the testator's death ; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime. *Davis v. Davis*, 532.

9. *Construction—Devise of Land not Owned by Testator—Application to Land Owned by Testator.*—A testator purporting to devise "all his real and personal estate," gave to one son the south fifty acres of lot 21, and to another the north fifty acres of the same lot. The will contained no residuary devise and no other gift of land. The testator died seized of the east half of lot 21, 100 acres, but had no interest in the west half :—

Held, that the one son took the south twenty-five acres of the east half of the lot and the other the north twenty-five acres, and they took together the central fifty acres as tenants in common. *McFadyen v. McFadyen*, 598.

10. *Construction—Devise—Estate—Defeasible Fee—“Die without Issue”—Share.*—A testator, dying in 1833, by his will, made in the

previous year, gave to his two sons, after a life estate to his wife, certain lands, *habendum* to his two sons "as tenants in common, their heirs and assigns forever, subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property and conveyed it as in fee simple to the purchaser, who failed to observe the provisions of the Act as to entails by registering his conveyance within six months:—

Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to an indefinite failure of descendants, the context was sufficient to restrict the interpretation.

Roe d. Sheers v. Jeffery, 7 T. R. 589, and *Greenwood v. Verdon*, 1 K. & J. 74, followed.

Chadock v. Cowley, 3 Cro. Jac. 695, distinguished.

Little v. Billings, 27 Gr., at p. 357, commented on. *Van Tassel v. Frederick*, 646.

11. *Execution—Attesting Witnesses—Inability to Procure Proof by—Other Sufficient Evidence—Letters after Execution—Admissibility.*—Where the Surrogate Judge is satisfied of the inability to furnish proof of the execution of a will by the attesting witnesses, it may be proved by other sufficient evidence.

A will in testator's handwriting and signed by him was found in a place where testator was accustomed to keep his papers, it being so signed

in the presence of two persons, who signed as witnesses, the handwriting being apparently that of two persons and distinct from that of the testator, and who, though due search was made for them, could not be found, this being attributable to their being strangers, testator being under the belief, from the misreading of a text book on wills, that strangers were the best witnesses. The Surrogate Judge being satisfied as to the inability to procure proof by the witnesses, and that the due execution of the will had been proved by other evidence, admitted it to probate. On appeal to the Divisional Court the judgment was affirmed.

Per BOYD, C.—Where the will is itself in evidence with the testator's and witnesses' signature thereon, post-testamentary letters of the testator are receivable in evidence to enable the Court to come to a right conclusion. *Re Young*, 698.

WINDING-UP ACT.

Clerks and Employees—R. S. C. ch. 129, sec. 56—Auditor.—*See* COMPANY, 1.

R. S. C. ch. 129—Action against Contributory—Bar to Action.—*See* SCIRE FACIAS.

WORDS.

"*Action.*"—*See* DIVISION COURTS, 3.

"*Cause.*"—*See* DIVISION COURTS, 3.

"*Clerks and other persons in or having been in the employment of the Company in or about its business or trade.*"—*See* COMPANY, 1.

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"*Exempt from Taxation.*"]—See
MUNICIPAL CORPORATIONS, 6.

"*In Three Annual Instalments.*"]
—See DIVISION COURTS, 1.

"*Joint Petition.*"]—See PUBLIC
SCHOOLS.

"*Lands Injuriouslly Affected.*"]—
See RAILWAYS.

"*Legal Personal Representatives*"
—*Will—Legacy.*]—See WILL, 4.

"*Negotiation.*"]—See BANKS AND
BANKING.

"*Opposite party.*"]—See RAIL-
WAYS, 2.

"*Or other person whatsoever.*"]—
See SUNDAY.

"*Owner.*"]—See LIEN, 1.

"*Printing.*"]—See COPYRIGHT.

"*Risk.*"]—See INSURANCE, 1.

"*Who may then be Heirs-at-law.*"]
—See WILL, 2.

**WORKMEN'S COMPENSATION
FOR INJURIES ACT, 1892.**

55 Vict. ch. 30 (O.), sec. 3, sub-sec.
3—*Negligence of Person to Whose
Order Workmen Bound to Conform
—Custom of Business.*]—See MAS-
TER AND SERVANT, 1.

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